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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA,

v. 18-cr-00192-JL-1
IMRAN ALRAI November 17, 2020
9:10 a.m.

* * * * *

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government: Cam T. Le, AUSA
John S. Davis, AUSA
Matthew Hunter, AUSA

For the Defense: Donna J. Brown, Esquire
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Also Present: John Commisso, Esquire
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PROCEEDINGS

THE CLERK: The court has before it for consideration this morning an evidentiary motion hearing in criminal case 18-cr-192-JL, United States of America versus Imran Alrai.

THE COURT: Good morning, Counsel. Let me just get started with a couple of things. Charli mentioned to me that you wanted to have a conversation about sequestration of witnesses.

You want to do that?

MS. BROWN: I can address that, Your Honor. This is Attorney Brown.

So we've subpoenaed four witnesses. I don't know that we'll call all of them. We'll probably reassess after the first two witnesses. But the four witnesses are in the order we may call them. Mr. Naviloff -- Greg Naviloff. Secondly is our expert, Jason Sgro. We are going to have our expert listen to the testimony of Jason -- not Jason -- of Greg Naviloff, because it may relate to his opinion testimony. And then we would either call Attorney -- and is it Commisso or Commisso?

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1 MR. DAVIS: I believe it's Commisso.
2 Or is it Commisso -- Commisso?
3 MR. COMMISSO: Commisso.
4 MR. DAVIS: Yeah, my bad.
5 MS. BROWN: I've heard many
6 pronunciations. Commisso. Okay. I'll try to
7 get that right. Thank you.

8 Before you joined us, Your Honor, the
9 Government expressed that they wanted
10 Attorney Commisso to be present during the
11 presentation of all the evidence, as he
12 represents the victim in this case. He is also
13 a witness, and we are asking that he be
14 excluded.

15 THE COURT: And the Government objects to
16 that?

17 MS. BROWN: They do.

18 MR. DAVIS: Judge, Mr. Commisso is the
19 victim's representative, and he has a right to
20 be present under rule 60(a)(2). For the Court
21 to exclude him, the Court would have to find
22 clear and convincing evidence that listening to
23 the testimony would somehow affect his
24 testimony. He's an officer of the court.
25 He's, by now, well known to the court. There's

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1 no basis for that finding, and the Defendant
2 has not even argued it.

3 If the Court is inclined to exclude the
4 victim, we would ask that the Defense call
5 Mr. Commissio first and do his testimony and
6 complete it, and then release him from his
7 subpoena so that he can attend the rest of the
8 proceedings.

9 But United Way has a right to have its
10 paid attorney, who has represented them
11 throughout, be present here. And the
12 Defendant's motion simply rides roughshod over
13 that right.

14 THE COURT: I don't think I agree,
15 actually. When you just cited the rule
16 regarding a finding the Court must make to
17 exclude him as a victim, you mean as the
18 victim; right? You don't mean as victim's
19 counsel; right?

20 MR. DAVIS: They are the same, Judge. The
21 discussion in the committee notes of Rule 60
22 make it very clear that the rule applies both
23 to the victim and the victim's counsel.

24 He is the counsel for the victim, and he
25 is the way the victim asserts its right to be

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1 present in these proceedings.

2 THE COURT: Yeah, but in a situation where
3 he's going to be a witness like today, why
4 can't they just send an officer of the
5 organization to allow for the sequestration?
6 Why is it so important that he not be
7 sequestered? He's going to testify -- I mean,
8 he's central to this entire analysis. I
9 mean -- that's not an aspersion, by the way,
10 but he's very central to it.

11 And I have to admit, I can't imagine he's
12 going to hear anything that would color his
13 testimony. He's been literally up to his
14 eyeballs in this litigation. He was at every
15 hearing with a defense agreement all along.

16 I remember, hearing after hearing, the
17 deputy clerk would contact me and say, "The
18 Government would like Mr. Commissio to
19 participate."

20 And I would always tell the deputy clerk,
21 "If it's okay with the Defendant, it's okay
22 with the Court." And he was always there. So
23 I don't have any objection to it, but this is a
24 little bit different.

25 Why do you want to fight on this?

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1 MR. DAVIS: Judge, I don't want to fight.
2 I just want to defend the victim's near
3 absolute right to be present here. And I'll
4 add that the rule is very clear. United Way,
5 because of the post-conviction litigation, has
6 had to pay -- I don't know how much money to
7 continue to be represented by counsel.
8 Mr. Commissio is their representative throughout
9 this litigation. United Way has a right, that
10 is near absolute, for him to be present.

11 There is a real potential for abuse here
12 by the defendants simply designating him as a
13 witness and then saying, "We're going to call
14 him last," and keeping him out of the hearing.
15 In light of many aspects of this litigation,
16 that potential is very real.

17 Your Honor, I don't want to fight about
18 this, but if it is that important to the
19 Defense that he be sequestered, and the Court
20 is prepared to make the finding, I would ask
21 that he be first. I don't know why the
22 Defendant has a right to a particular witness
23 order. And what the victim has a right to is
24 for the Court to explore reasonable
25 alternatives. That's right in 60(a)(2). And a

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1 reasonable alternative here is to call him
2 first. The Defendant hasn't even stated a
3 reason or an objection to calling him first.
4 So, respectfully, I suggest we do that and
5 protect the victim's right.

6 THE COURT: I do think that's a reasonable
7 suggestion. It's very reasonable, actually.

8 MR. DAVIS: Thank you.

9 THE COURT: Why not just call him first,
10 Attorney Brown? Then he can watch the rest of
11 the witnesses.

12 MS. BROWN: Obviously, we've considered
13 that, Your Honor. And as we've gone to prepare
14 the case over the last four or five days, it
15 just doesn't -- the foundation for things that
16 we would ask Attorney Commissio aren't there.
17 It does not flow in terms of what we're trying
18 to establish for the Court.

19 I think the first two witnesses,
20 especially Mr. Naviloff, really go to the heart
21 of the Brady issue. And Attorney Commissio,
22 obviously, is much more related to whether this
23 is a third party or not a third party. And
24 before we even get to that, we have to
25 establish that there was a Brady violation, and

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1 we intend to do that with the first two
2 witnesses. So we had considered that. We're
3 not doing it for any sort of tricky reason. It
4 was just -- it didn't flow. It didn't make
5 sense in terms of the presentation of the case.
6 And that's the only reason.

7 And as the Court knows, most every, if not
8 every, document we're going to talk about,
9 Attorney Commisso has seen, because they've
10 been attached to documents that I'm sure the
11 Government has shared with them. Even though a
12 lot of the documents are under seal, they are
13 probably consulting with him. He's aware of
14 what's happening. This hearing is on the
15 record. He can certainly listen to it
16 afterwards or read it afterwards and report
17 back to the victims as to what happened.

18 THE COURT: But that's not -- if I exclude
19 him, I'm going to give them an opportunity to
20 -- doesn't Mr. Meyer work for United Way now,
21 or is he just a contractor?

22 MR. HUNTER: He is a contractor for the
23 United Way, Your Honor.

24 THE COURT: Thank you.

25 I mean, if I did exclude Mr. Commisso from

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1 -- if I did sequester him -- I wouldn't exclude
2 him, of course. If I did sequester him, I
3 would give him an opportunity to have someone
4 from the victim participate in this hearing and
5 be present.

6 So he wouldn't have to review it later and
7 all that. I mean, it would be available, but
8 it wouldn't really be necessary. Let me just
9 check the rule real quickly here. I've got to
10 get my reading glasses. Hold on here. Okay.

11 It looks like 60(a)(2); right, Mr. Davis?

12 MR. DAVIS: Correct, Judge, yes.

13 THE COURT: Well, let me ask you -- I
14 mean, the victim is asserting -- the
15 prosecution is asserting the victim's right to
16 be present, Attorney Brown, and asserting that
17 through the attendance and participation of
18 Mr. Commisso.

19 I mean, I don't even know, Mr. Davis, if
20 sequestration equals exclusion. It seems to be
21 an assumption. You're telling me the committee
22 notes cover that? I don't know. But there's a
23 lot of moving parts to this. There could be
24 other representatives here. The fact that
25 they've chosen counsel doesn't mean that they'd

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1 be excluded. So I'm just wondering about some
2 of these things.

3 MR. DAVIS: So, Judge, if I could point
4 the Court to the Advisory Committee notes to
5 the 2008 revision, (a)(2).

6 THE COURT: I'm looking at it. Yep.

7 MR. DAVIS: The second paragraph of that
8 addresses this.

9 It says, "Rule 615 of the federal rules
10 addresses the sequestration of witnesses.

11 Although Rule 615 requires the Court, upon the
12 request of a party, to order the witnesses to
13 be excluded so they cannot hear the testimony
14 of other witnesses, it contains an exception
15 for a person authorized by the statute to be
16 present. And accordingly, there is no conflict
17 between Rule 615 and this rule, which
18 implements the provisions of the Crime Victims
19 Rights Act."

20 THE COURT: Yes.

21 Again, though -- well, Ms. Brown, is it
22 your position that the victim's testimony --
23 Mr. Commissio's testimony -- would be materially
24 altered if he heard other testimony at that
25 proceeding?

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1 Before you answer that question --

2 Mr. Davis, can you point to me -- I thought you
3 made an argument earlier regarding -- it might
4 not have been a rules-based argument --
5 regarding the idea that counsel for the
6 United Way is the United Way in this
7 proceeding -- why an adequate substitute
8 couldn't just be brought in from the
9 United Way?

10 MR. DAVIS: So subdivision (b) of the same
11 advisory committee notes -- it actually refers
12 to counsel, I think, in a couple of places.

13 But if you look at subdivision (b) --

14 THE COURT: Let me just read it. Thank
15 you.

16 MR. DAVIS: -- in the notes.

17 THE COURT: Yep.

18 MR. DAVIS: "In referring to the victim
19 and the victim's lawful representative, the
20 committee intends to include counsel."

21 THE COURT: Yep.

22 MR. DAVIS: Judge, we don't want to fight
23 about this. And we'd even readily agree to a
24 brief continuance if Ms. Brown is dead set
25 on -- and needs then to alter her order of

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1 proof and is somehow damaged by calling
2 Mr. Commisso first. Let's give her some more
3 time. That's fine. But please do not
4 sequester the attorney for the victim here.

5 THE COURT: I know, but the attorney for
6 the victim is really involved in the facts and
7 circumstances that gave rise to this motion to
8 dismiss; right? His involvement is very much
9 at issue.

10 I am undecided about this motion. My mind
11 is very much open. And I think -- I'll
12 admit -- I'm going to be up front about this --
13 that Counsel's rule is not, to me, necessarily
14 the most important factor, okay, in this
15 analysis. It's part of it. I mean, we're at a
16 situation where the Defendant won't budge on
17 anything, so I guess I've got to make the
18 determination.

19 Is it your position, Ms. Brown, that under
20 rule 60(a)(2) -- which, I think, Mr. Davis
21 makes a reasonable argument applies to the
22 victim's counsel -- that his testimony would be
23 materially altered if he heard the testimony of
24 the proceedings?

25 MS. BROWN: Yes, Your Honor. And as a

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1 very brief offer of proof, as I said before,
2 it's very important in terms of presentation
3 that we start with Mr. Naviloff. Because that
4 is the big issue here. And much of what we're
5 going to be questioning Mr. Naviloff about is
6 emails that he exchanged back and forth between
7 Attorney Comisso, and that his -- it probably
8 won't go a minute without mentioning
9 Attorney Comisso in terms of involvement with
10 Mr. Naviloff and the sharing of the emails
11 between the both of them. It's not a sort of
12 tangential reference. And all the more reason
13 why, before we ask Attorney Comisso about some
14 of these emails, we have to lay the foundation
15 through Attorney -- not Attorney --
16 Mr. Naviloff.

17 MR. COMISSO: Your Honor, may I address
18 one or two issues?

19 THE COURT: Sure.

20 MR. COMISSO: Thank you, Your Honor.

21 One issue is a concern about the
22 attorney-client privilege. Mr. Naviloff and
23 Mr. Meyer are going to be questioned by the
24 Defendant. And I am the only person who is in
25 a position to ensure that that examination and

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1 the witness' answers don't infringe upon the
2 United Way's attorney-client privilege.

3 THE COURT: How would you possibly do
4 that?

5 MR. COMMISSO: How would I...

6 THE COURT: Have I admitted you as an
7 intervenor or -- I guess I've admitted you pro
8 hac vice; right?

9 MR. COMMISSO: Well, Your Honor, I filed
10 two documents. One was for admission pro hac
11 vice.

12 THE COURT: I'm really about asking
13 questions and having an answer. It's just the
14 way I operate. I'm trying to remember, because
15 I think I remember granting you pro hac vice
16 admission.

17 Did I do that or not?

18 MR. COMMISSO: I haven't seen it on the
19 docket.

20 THE COURT: Mr. Davis, do you know?
21 Because I thought I did.

22 THE CLERK: Yeah, Judge --

23 THE COURT: I did grant it, because I knew
24 you wanted to file a motion to intervene, so I
25 granted the motion. All right. So I guess you

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1 are admitted, so you could assert. Okay. I've
2 answered my own question, kind of. Good.

3 Go ahead and continue.

4 MR. COMMISSO: Okay.

5 So one is the necessity for me to be
6 present during Meyer and Naviloff's testimony
7 to assert the privilege on behalf of the
8 victim. Number two is the two experts are
9 going to be present during each other's
10 testimony. So, obviously, there's room in the
11 rules of sequestration to allow for exceptions
12 to that rule. And here the rule specifically,
13 as Mr. Davis already read -- the rule
14 specifically identifies the exception to the
15 sequestration rule.

16 And I'd also like to say, I'm not just
17 hired counsel in some generic sense. I am
18 essentially, for all intents and purposes,
19 general counsel of the United Way of
20 Massachusetts Bay. They don't have an in-house
21 counsel. And if I held that title of general
22 counsel, I don't know that we'd be having this
23 discussion; but the board of directors and the
24 special committee authorized by the board of
25 directors passed a resolution to engage me as

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1 the representative. The corporation can only
2 act through representatives. And I am the
3 corporation's representative. I know these
4 issues better than anyone and more than anyone.
5 And the board and the special committee -- the
6 corporation -- has appointed me to represent
7 them before Your Honor.

8 And with that, I will pause.

9 THE COURT: Yeah.

10 MR. DAVIS: Judge, I would only add the
11 Court asked a direct question to Ms. Brown:
12 Would the testimony be materially altered?

13 Ms. Brown didn't answer that question.
14 She said that Mr. Commissio would come up in the
15 testimony, but she -- even she does not say
16 that an officer of the court and Mr. Commissio
17 would be shaping, or shading, or modifying his
18 testimony as a result of hearing any other
19 testimony in this case.

20 Again, it's her burden. And the burden is
21 clear and convincing evidence. She hasn't
22 anywhere near met that burden.

23 And the Court says, "Well, the Defendant
24 wouldn't budge." The Government isn't
25 surprised by that, Your Honor. The Defendant

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1 has never budged at any point in this case.
2 It's been two years of this, and so he isn't
3 budging now.

4 Well, we say, "So what?"

5 THE COURT: Well, actually, that's not how
6 I remember it, Mr. Davis. I admit this
7 particular counsel has not been budging -- and
8 she has no obligation to budge, by the way --
9 none whatsoever.

10 But Mr. Harrington approached it
11 differently; right? And some of the discovery
12 decisions we made going along here laid the
13 foundation for all this -- some of the
14 decisions I made based on agreements between
15 everybody. But it wasn't as if everything was
16 fought tooth and nail. And if defense counsel
17 wants to fight tooth and nail now, we all know
18 she has that right and, perhaps, that
19 obligation. So, look -- but I've got to bring
20 this to an end because we've got to get on with
21 this.

22 My preference -- let me just tell you, as
23 a trier of fact of this, my preference would be
24 that he be sequestered; okay. That's the way I
25 like accepting testimony. I understand,

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1 though, Mr. Commisso's point that the victim
2 and its board has entrusted him with
3 representing them in this proceeding, and he's
4 the only one here doing that.

5 I guess I would ask you, Mr. Commisso, can
6 you arrange for, during your brief
7 sequestration here, that someone else in the
8 United Way be present?

9 MR. COMMISSO: Perhaps it's possible, but
10 that individual couldn't really represent the
11 United Way in the way that I will, which, as I
12 said, there are these issues with respect to
13 privilege that are going to come up with two of
14 the witnesses' testimony.

15 And how do I then go back and advise the
16 United Way, and do my duty as their attorney to
17 provide them advice and counsel with respect to
18 what happens at this hearing, if I have been
19 excluded based on -- I guess it would be based
20 on the idea that, as a member of the bar with
21 20 years of experience practicing in the
22 federal court, that the Court couldn't be
23 satisfied that my testimony is not going to be
24 materially altered, where I've read every
25 document in the case, and I've attended the

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1 entire trial and every hearing in the case, and
2 I know the issues as well as the attorneys who
3 are going to be making the arguments and
4 questioning the witnesses.

5 THE COURT: Okay. Here's the ruling. I
6 cannot find -- I'll say it this way.

7 Despite my announced preference that
8 Mr. Commissio be sequestered and that I will
9 have to take this into consideration when I
10 evaluate the testimony -- despite signaling
11 that, I cannot find that there's clear and
12 convincing evidence that Mr. Commissio would --
13 based on defense counsel's argument, I cannot
14 find, by clear and convincing evidence, that
15 Mr. Commissio's testimony would be materially
16 altered if he heard other testimony of the
17 proceeding. There's just not a basis for that
18 based on this record. So I'm going to deny the
19 motion to sequester Attorney Commissio.

20 Now, other witnesses, Ms. Brown, you'd
21 like sequestered, let me know.

22 MS. BROWN: I think that would just leave
23 Attorney Meyer -- I keep saying "Attorney."

24 It would leave John Meyer to be
25 sequestered. I don't know if the Government

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1 would intend to call Mr. Naviloff after we
2 called Mr. Sgro, and whether he would need to
3 be --

4 THE COURT: Experts are generally not
5 sequestered.

6 MS. BROWN: Okay. Then that would be the
7 only person -- would be Mr. Meyer.

8 THE COURT: So any objection, Mr. Davis,
9 on Meyer?

10 MR. DAVIS: No.

11 THE COURT: So, Charli, Mr. Meyer will be
12 excluded during the testimony of either
13 witnesses, but -- well, didn't have to happen
14 yet, though. We haven't started testimony yet.
15 He's still there. Good.

16 Any other procedural matters,
17 Counsel Brown, before we start?

18 MS. BROWN: Yes, Your Honor. Two just
19 that I made a note I wanted to address.
20 Ordinarily, if we were going to show an exhibit
21 that was marked for ID, we wouldn't show it to
22 the trier of fact, but it's kind of hard to do.

23 So I just wanted to -- most of our
24 exhibits are marked for identification at this
25 point. So to make them full exhibits, we'd

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1 actually have to show them on the screen to the
2 witness. I just wanted the Court to see if the
3 parties had any problem with us doing that.

4 THE COURT: Well, Counsel conferred about
5 the exhibits.

6 I mean, is there any debate about whether
7 there's admissibility before me in this
8 proceeding?

9 MS. BROWN: Most of them have already been
10 attached, if not all have been attached, to
11 motions. So I just wanted to --

12 THE COURT: Here's the ruling: All
13 exhibits by either party are deemed admitted in
14 this proceeding. However, that's what I'll
15 prejudice to both of you -- Mr. Davis, and
16 Ms. Brown, and any counsel -- if there's an
17 exhibit that's on the table that's been raised
18 and you think there's some barrier to its
19 admissibility, you should raise it. It might
20 just be an argument that goes to weight rather
21 than admissibility.

22 But if you think there's an admissibility
23 argument, raise it, and I'll consider excluding
24 it. But rather than having people lay
25 foundations for ID and all that this hearing,

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1 that seems reasonable.

2 Any objection, Mr. Davis?

3 MR. DAVIS: No.

4 MS. LE: Your Honor, can I just point out
5 that Ms. Brown has marked for identification
6 exhibits that have been subject and are subject
7 to a protective order.

8 So we'd ask that Ms. Brown make sure that
9 those exhibits that are a part of the
10 protective order be filed under a CO,
11 Your Honor.

12 THE COURT: Sure.

13 Do you know which ones, Ms. Brown, are
14 protective order-covered?

15 MS. BROWN: I would say the vast majority,
16 if not -- except for maybe a couple of letters.
17 So I have no problem with having them all
18 placed under seal, just out of an abundance of
19 caution.

20 THE COURT: The exhibits are all
21 admissible, but I'll also submit it under seal
22 at level one.

23 To honor the protective order, what I
24 would ask is that after the hearing, Ms. Le,
25 you consult with Attorney Brown. And if there

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1 are any exhibits not covered by the protective
2 order, I'll unseal those; okay?

3 MS. LE: We will gladly do that,
4 Your Honor. We just got dropped 1,000 pages of
5 exhibits, so it's hard to go through every
6 single page now. Thank you.

7 THE COURT: I understand. Thank you. And
8 I appreciate you bringing it up. Well, let me
9 say this, then.

10 If you've been unfairly prejudiced by this
11 eleventh hour -- and I'm not accepting this.
12 I'm just accepting your representation -- sort
13 of a document dump at the eleventh hour, do you
14 need more time to prepare?

15 MS. LE: No, Your Honor. We can move
16 forward.

17 THE COURT: Okay. All right.
18 Anything else, procedurally, people need
19 to bring up?

20 MS. BROWN: This isn't as much of a
21 procedural issue, Your Honor. I just -- both
22 Attorney Eaton and myself, and our
23 examinations, are going to make every attempt
24 that when we talk about a document, that we
25 identify it as something that was either

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1 produced pretrial or it was something posttrial
2 and, therefore, subject to the Brady issue.

3 And to the extent we get to do that and
4 the Court has a question like, "Hey, was this
5 pre?" Feel free to interrupt us. But we're
6 going to try -- there's going to be some
7 documents that were produced prior to trial
8 that are just important to lay the foundation
9 to the relevance and importance of the
10 documents after trial. So we'll do our best to
11 identify those documents for the record, but I
12 just wanted the Court -- if it's not clear from
13 our examination, feel free to interrupt.

14 THE COURT: Sure. Okay. That's fine.

15 I would ask -- are you talking about
16 exhibits -- if it's a document that's been
17 docketed, and it's 162-3, I would request you
18 use that. And if it's -- excuse me.

19 If it's a trial exhibit, I would request
20 you use that. Because for the court of
21 appeals, it's going to be difficult; all right.
22 So naming them as exhibits to this hearing --
23 probably not particularly helpful in the long
24 run. So do your best, please.

25 MS. BROWN: Okay.

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1 THE COURT: Okay. Now I have three quick
2 issues I want to nail down so I have a good
3 foundation to do this today.

4 One is time; right? I'm looking at -- let
5 me just look quickly -- yeah. I mean, we have
6 potentially four witnesses; right? I'm sure
7 you both have arguments you want to advance --
8 just plain oral argument. And I have
9 questions. I've got several questions.

10 So I think there's a decent chance this
11 hearing takes all day long. I don't know that,
12 but it certainly is going to take more than up
13 to the lunch hour. So I plan on working sort
14 of a normal trial day. I hope people are
15 available. But that's just my assumption right
16 now -- that we're going to spend the day in
17 courtroom doing this hearing.

18 Two questions for you. As I understand
19 the motion, it's a motion to dismiss for
20 constitutional violation to the Brady
21 doctrine -- failure to produce exculpatory
22 evidence that the Defendant says amounted to
23 prejudice at trial; right?

24 There's no challenge to any discovery
25 ruling during the case; right -- in terms of,

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1 like, a failure to either comply with Rule 16
2 or to comply with a court order on discovery.
3 This is a constitutional motion for failure to
4 produce exculpatory evidence.

5 Am I right, Attorney Brown?

6 MS. BROWN: Yes, as far as I know, there
7 wasn't a motion for discovery filed pretrial
8 that's relevant to these issues.

9 THE COURT: No. The closest we came was
10 that motion to exclude Mr. Naviloff, which we
11 resolved through the production of some
12 discovery that, as of that time, had not been
13 provided.

14 So I'm correct that there's no challenge
15 to a rule violation or an order violation.

16 It's a constitutional violation under Brady;
17 right?

18 MS. BROWN: Correct. And just to the
19 extent that there was some back-and-forth on
20 this prior to trial, it's relevant to the
21 production and notice of some of these
22 documents.

23 THE COURT: Yep.

24 Second question -- and this is for both
25 parties. That first question for was Attorney

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1 Brown. This is for both parties.

2 One question I have about this -- this is
3 a motion to dismiss, but there's nobody
4 addressing in the briefing, like, what is the
5 prescribed remedy here? There's references in
6 both of your papers to the possibility of a new
7 trial. And I guess my question for both of you
8 is this: If I found a Brady violation -- let's
9 assume I found a Brady violation that amounted
10 to a failure to produce that was prejudicial,
11 and I found it in violation.

12 What's the remedy? Is it possibly
13 dismissal, possibly new trial? Is it either?
14 Both? Like, what's the remedy? Because that's
15 not really been focused on by the parties,
16 except by sort of references by both sides.

17 I guess I'll hear from the prosecutor
18 first.

19 MR. HUNTER: Thank you, Your Honor.

20 I think the remedy would not be dismissal.
21 Because in order to show dismissal, the Court,
22 as I understand the Defendant's argument, would
23 have to show egregious prosecutorial
24 misconduct. And I think if there was a
25 technical Brady violation -- which, of course,

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1 the Government contests -- I don't think it
2 rises to the level of truly egregious
3 prosecutorial misconduct. And so then we're in
4 the new trial framework. Because ultimately,
5 this is a Rule 33 motion, with a clause that
6 the prosecutorial misconduct is so egregious it
7 warrants dismissal.

8 So then I think it would be -- again, if
9 the Court finds a violation that's sufficiently
10 problematic --

11 THE COURT: Violative of the Constitution.

12 MR. HUNTER: Right, sufficiently
13 violative -- then we're in Rule 33. Which I
14 think, because this is a bench trial, the Court
15 has more flexibility than if this were a jury
16 trial. And what the Court can do is, rather
17 than having a whole new trial, because the
18 Court was the finder of fact under Rule 33, the
19 Court can basically open the trial back up
20 again, hear additional evidence, hear
21 additional testimony, and then, if it deems it
22 appropriate, can amend the judgment.

23 And so we cite that rule in our papers.
24 But I think if the Court finds a sufficient
25 violation, the remedy would basically be for

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1 the Court to hear additional trial testimony
2 based on this newly discovered evidence.

3 THE COURT: All right. Understood. Yeah,
4 I appreciate you are putting a -- I saw the
5 reference to that in your papers, and now I
6 understand it better in the context of Rule 33,
7 Mr. Hunter. Thank you for a clarification.
8 Okay.

9 Ms. Brown, what's your position?

10 MS. BROWN: We do agree that the case law
11 is such that the first analysis goes to whether
12 a new trial can cure the Brady violation. And
13 then after that, I agree that if the violation
14 was egregious enough, then it's a dismissal.
15 So we're in agreement on that.

16 The issue of hearing new evidence, I
17 think, is very complicated at this point.
18 Because I'll just say: It's a failure to be
19 able to cross-examine someone. So do you do a
20 do-over on the cross-examination? And it's
21 sort of not this magical witness who was
22 missing that you come in and just add to it.
23 It's a very different type of thing.

24 So I don't think we have to deal with that
25 right now. I do agree that's what the language

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1 of Rule 33 says. And I think that would be for
2 the Court to deem whether that's a remedy.
3 Obviously, if we don't think a new trial is an
4 adequate remedy, we don't think that is an
5 adequate remedy as well.

6 THE COURT: Right. It focuses on the next
7 level of egregiousness as to whether that
8 process would cure. Okay. I will say this.

9 While I have a very, very open mind about
10 whether this is a Brady violation -- there's a
11 lot of interesting questions here, and not a
12 lot of precedent in the cases for this type of
13 situation -- I will say this.

14 The Defendant's papers make some very,
15 very serious allegations and accusations
16 against the prosecution. What I've read,
17 though, in terms of the briefing, the
18 documents, my memory of the trial -- this
19 doesn't really rise to what I would view as,
20 you know, egregious prosecutorial misconduct,
21 if it's misconduct at all. It strikes me more
22 as, if it's a violation -- if it is, it was
23 more sort of a unique situation that presented
24 itself with an expert witness that had done
25 some work for the victim before, and very

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1 pervasive involvement by the victim's counsel.
2 It doesn't strike me as an intentional effort
3 to manipulate the discovery process, or even,
4 like, some sort of really gross negligence that
5 might even rise to that level.

6 I have an open mind about it. And I'm
7 going to listen, of course, to the evidence;
8 but at this point, the egregiousness of it is
9 not coming through to me in terms of
10 intentional misconduct and intentional
11 discovery abuses, or even -- so they might have
12 been impactful, but not impactful in such a
13 significant way that even a negligent violation
14 would have to be labeled "egregious." That's
15 my sense early in the thing. I just want you
16 to know that's where my head is now. Of
17 course, I'm open to being persuaded by both
18 sides. Okay.

19 While I do have questions, I think we
20 should get underway with the witnesses. I
21 think that's the best approach. So the burden
22 of proof here is on the Defendant.

23 I'll let you call your first witness,
24 Ms. Brown.

25 Let's sequester Mr. Meyer, please, Charli.

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1 THE CLERK: Very good.

2 Mr. Meyer, I'm going to place you in the
3 waiting room.

4 MS. BROWN: And the Defense is going to
5 call Mr. Greg Naviloff.

6 So if the Court could swear him in.

7 THE CLERK: Mr. Naviloff, please raise
8 your right hand.

9 Do you solemnly swear the testimony you're
10 about to give will be the truth, the whole
11 truth, and nothing but the truth, so help you
12 God?

13 MR. NAVILOFF: I do.

14 THE CLERK: And for the record, please
15 state your full name and spell your last name.

16 MR. NAVILOFF: Greg Naviloff,
17 N-A-V-I-L-O-F-F.

18 THE CLERK: Thank you.

19 MS. BROWN: Thank you.

20
21 DIRECT EXAMINATION

22 BY MS. BROWN:

23 Q. And, Mr. Naviloff, do you still work for RSM?

24 A. Yes, I do.

25 Q. And what role do you currently hold at RSM?

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1 A. I am a director within the financial
2 investigation dispute services practice.

3 Q. And this was -- you were questioned about this
4 briefly at trial.

5 You are not an IT expert; correct?

6 A. I don't carry any credentials in IT services.

7 Q. And just for credentials, your credentials are
8 in accounting, and specifically forensic
9 accounting; correct?

10 A. And business valuation and valuation as a
11 whole.

12 Q. Now I am going to ask you about a couple --
13 well, strike that.

14 You've had, for lack of a better word, two
15 hats in this case; right? You worked for
16 United Way; correct?

17 A. Yes, I worked for United Way. If the hats are
18 engagement letters, yes. There's two
19 engagement letters -- two contracts or
20 agreements.

21 Q. So somewhere in the middle of July of '18 up
22 until the spring of 2019, you were working for
23 United Way with an engagement letter that was
24 signed between you and Mr. Commissio; correct?

25 A. That is correct, yes.

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1 Q. And then after that -- and to the summer of
2 2019 until today, you have engagement letters
3 with the Government -- the U.S. Government;
4 correct?

5 A. Yes, I have a contract with the U.S. Attorney's
6 Office to assist.

7 Q. So I want to go back and ask you some questions
8 about your representation -- not
9 representation -- your work for the United Way
10 back in summer of 2018.

11 And I'm going to ask the clerk to bring up
12 Exhibit Z, which is now a full exhibit. And
13 just for the record, that is the report that
14 you did for the United Way.

15 (Pre-marked Defendant's Exhibit Z
16 introduced.)

17 MS. LE: Ms. Brown, do you have the ECF
18 number for that exhibit?

19 MS. BROWN: That one doesn't have an ECF
20 number because I don't think we attached that
21 before. I have the ECF numbers for other
22 exhibits, but that one, I do not have. And I'm
23 looking specifically at page 30 of Exhibit Z.

24 THE COURT: Is that Deputy Clerk Uhrin
25 who's running this?

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1 THE CLERK: Yes.

2 MS. BROWN: That's exactly what I'm
3 looking for. Thank you.

4 Q. (By Ms. Brown) So, Mr. Naviloff, do you
5 recognize this document? And we're looking --
6 I'm going by the PDF counter number in terms of
7 number, but this is page 30.

8 Do you recognize this document?

9 A. Not specifically to a meeting, but, generally,
10 yes.

11 Q. If I told you this was the -- I think in some
12 of your emails you used the word "slides," but
13 a presentation that you helped put together for
14 a committee at the United Way regarding
15 allegations of loss and theft regarding
16 Mr. Alrai, does that refresh your recollection?

17 A. Well, we had a number of committee -- special
18 committee meetings, and board meetings, and
19 different groups within United Way that
20 received varying amounts of information. So,
21 this appears to be a slide from one of those
22 meetings and/presentations.

23 Q. Okay.

24 And we'll get to it later, but there were
25 several emails back and forth regarding putting

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1 together some of these presentations for the
2 United Way; correct?

3 A. Emails back and forth between who?

4 Q. Between you and your team at RSM.

5 A. Yeah. Presumably, we exchanged emails, yes.

6 Q. And just for the Court's notation, this
7 document, Exhibit Z, was produced prior to
8 trial. So this is a document I'm just setting
9 a foundation for.

10 So in this document, the bar at the top
11 says "Potential Recoveries"; correct?

12 A. Correct. Yes.

13 Q. And the purpose of this slide was to look at
14 sources of funds to -- for United Way to
15 recover regarding the losses involving
16 Mr. Alrai; correct?

17 A. That's correct.

18 Q. And in the middle, there's a graph or a bar
19 graph that identifies \$1,025,000 of coverage
20 that is available from the Chubb insurance
21 policy that United Way had; correct?

22 A. A column labeled "Coverage," yes, that contains
23 two amounts that total that, yes.

24 Q. Now, under that chart, there's another bullet.
25 Actually, I think the second bullet.

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1 It says, "There is potential for
2 additional recoveries as a result of the
3 potential criminal action brought against Alrai
4 by the U.S. Attorney's Office"; correct?

5 A. Correct.

6 Q. And the third bullet is "Counsel will prepare a
7 proof of claim for insurance purposes and
8 continue to support the U.S. Attorney's Office
9 investigation and prosecution of Alrai";
10 correct?

11 A. Correct. Yes.

12 Q. So when you're meting with the people in
13 control at United Way, one of the sources of
14 funds that you're looking at for loss is the
15 criminal prosecution; correct?

16 A. One of the avenues that I was made aware of by
17 counsel was this process, yes.

18 Q. And by "counsel," do you mean Attorney Commissio
19 or the attorneys from the U.S. Attorney's
20 Office?

21 A. Attorney Commissio, yes. This is a report --

22 Q. So he told --

23 A. Sorry. If I can continue.

24 Q. It's hard not to interrupt.

25 A. No, that's okay.

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1 This is a report that, presumably, was
2 prepared -- I believe most of these were
3 prepared with Mr. Commissio, and Mr. Commissio
4 either providing input or incorporating some of
5 this informations himself into these slides.

6 Q. So when you were helping to put the slide
7 together, there were conversations about the
8 fact that a criminal prosecution might be a
9 source of recovery for the United Way; correct?

10 A. I don't recall any conversations. I think this
11 may be an area that Mr. Commissio put this in
12 here. I know generally, we were aware that the
13 U.S. Attorney's Office was investigating, but I
14 don't recall any real discussion in substance
15 around this.

16 Q. But you were generally aware that a criminal
17 case may be a source of funds for the
18 United Way?

19 A. Advising the special committee and advising
20 United Way, our mutual client, this was
21 certainly a potential.

22 (Audio drops for 37 seconds.)

23 Q. (By Ms. Brown) Here is a group of attorneys
24 and the United Way.

25 Does that look familiar to you?

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1 A. Yes, it does.

2 MS. BROWN: And I'm going to ask you,
3 Tracy, to go to page six of this document.

4 Q. (By Ms. Brown) And it shows your signature on
5 page six; correct?

6 A. Correct.

7 Q. I'm going to go back to page one of this
8 exhibit. And I believe it is that -- if we can
9 pull out the first paragraph after "Objective."

10 And as part of this agreement, you and RSM
11 agreed to provide "various accounting,
12 financial, economic, forensic, investigative,
13 or other services, including the preparation of
14 a Rule 26 expert report"; do you see that?

15 A. Yep, I do.

16 Q. What's your understanding of a "Rule 26 expert
17 report"?

18 A. Rule 26 -- don't quote me on it, but I believe
19 it's a factual expert report.

20 Q. So when you entered into this engagement letter
21 with Attorney Comisso and United Way, you
22 understood that that would include a Rule 26
23 expert report?

24 A. We have standard language in our contracts,
25 engagement letters. This is boilerplate

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1 language -- what we include in our contracts as
2 far as always a potential that some expert
3 testimony may be necessary.

4 MS. BROWN: If you could take that down,
5 Tracy. Thank you. Actually, just take down
6 that pullout or the magnification. Go to page
7 three of the same document.

8 Q. (By Ms. Brown) Looking at the fourth paragraph
9 of that document, it says that "the conclusion
10 of the engagement" -- yeah, right there.

11 So this paragraph here talks about "at the
12 conclusion of the engagement," that "you will
13 protect any confidentiality involving your work
14 for the United Way"; does that sound like
15 boilerplate language as well?

16 A. Yes.

17 Q. And that was in that engagement letter as you
18 protecting work that you did for the
19 United Way; correct?

20 A. Correct.

21 MS. BROWN: You can take that down, Tracy.

22 Q. (By Ms. Brown) Now, when you were working for
23 the United Way, you sent billings to
24 United Way; correct?

25 A. Correct, yes.

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(Pre-marked Defendant's Exhibit M
introduced.)

Q. (By Ms. Brown) And I'm going to pull up Exhibit M, which is the August 3, 2018 billing that RSM sent to Attorney Comisso.

Does that look familiar to you?

A. Yes, it does.

Q. And that's a bill for -- I'm reading my notes and not that -- but for \$45,171.70; correct?

A. **Correct.** Yes.

MS. BROWN: And, Tracy, I'll have you pull up Exhibit N.

(Pre-marked Defendant's Exhibit N
introduced.)

Q. (By Ms. Brown) Which is a September 10, 2018 invoice RSM sent to Commisso for \$170,682.18; correct?

A. Correct.

MS. BROWN: And pull up Exhibit O, which is the October 11, 2018 invoice that RSM sent to Attorney Commisso for -- actually, that one's -- yeah.

(Pre-marked Defendant's Exhibit O
introduced.)

25 MS. BROWN: So the one that has 113 is O.

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1 so the next one will be 30,000, which is --
2 bring up Exhibit P. Oh, I'm sorry. I've got
3 that at 55,000.

4 (Pre-marked Defendant's Exhibit P
5 introduced.)

6 MS. BROWN: And then I'm looking for
7 Exhibit Q, which is a January 8, 2019 invoice.

8 (Pre-marked Defendant's Exhibit Q
9 introduced.)

10 MS. BROWN: Now if you can -- I don't know
11 if it's possible, Tracy, to pull out the third
12 line that starts with the words "ad hoc
13 response." Yes, that's good.

14 Q. (By Ms. Brown) So this billing talks about ad
15 hoc responses to U.S. Attorney's Office
16 regarding criminal investigation proceedings;
17 correct?

18 A. Correct. Yes.

19 Q. So when you were working for the United Way,
20 you were billing the United Way for work that
21 you were doing with -- in conjunction with the
22 U.S. Attorney's Office in terms of meeting with
23 them and producing documents; correct?

24 A. This would be as described -- "some responses
25 to requests from the U.S. Attorney's Office."

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1 I don't think those requests were made directly
2 to RSM, but I could be wrong. I don't have my
3 recollection of January 2019. But, most
4 likely, they would direct it to Mr. Commissio --
5 Attorney Commissio. And we were assisting him.

6 Q. Now, we talked a little while ago about the
7 fact that you had -- in your engagement letter,
8 it talks about confidentiality regarding your
9 work from the United Way.

10 When you started having conversations with
11 the U.S. Attorney's Office or emailing the U.S.
12 Attorney's Office or phone calls, did you
13 assert that privilege to those contacts?

14 A. Any discussions we would have had with the U.S.
15 Attorney's Office would have been with
16 Attorney Commissio, who ultimately can choose to
17 waive or determine whether there is privilege
18 or what can be shared.

19 So we follow the lead of -- or I follow
20 the lead of Attorney Commissio with respect to
21 what can and can't be shared with the U.S.
22 Attorney's Office.

23 Q. You don't have any recollection of
24 Attorney Commissio asserting attorney-client
25 privilege as to any of your contacts or

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1 document productions with the U.S. Attorney's
2 Office, do you?

3 A. I believe there was discussion -- ongoing
4 discussion with -- just about anything that was
5 requested, it was shared with Attorney Commissio
6 for that very reason; right? So that he could
7 be the one responsible for determining what to
8 share.

9 There may have been isolated incidences
10 where there was maybe a phone discussion or
11 some sort of discussion with respect to
12 information that made its way to the U.S.
13 Attorney's Office directly from us, with a cc
14 to Attorney Commissio.

15 MS. BROWN: Thank you, Tracy. You can
16 take down that document.

17 Q. (By Ms. Brown) So we talked about the fact
18 that you worked -- you and RSM worked for
19 United Way through the summer and into the fall
20 of 2018; does that sound correct?

21 A. That's correct, yes.

22 Q. And part of that work you did was to prepare a
23 report we reviewed a few minutes ago; correct?

24 A. There were multiple presentations that were
25 provided to the special committee and others,

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updating them periodically and including reports that included a loss quantification.

(Pre-marked Defendant's Exhibit S
introduced.)

MS. BROWN: I'm going to ask you some questions about Exhibit S, which is also Document No. 164-19.

Tracy, if I could pull up the bottom half of that email that starts "From: Naviloff, Greg." And that whole -- basically, the whole half. Yeah, if you could pull that out.

12 Q. (By Ms. Brown) Now -- and this is November 9,
13 2018; correct?

14 A. Yes.

15 Q. And you're still working for United Way and
16 Attorney Comisso at that point?

17 A. Yes, that's correct.

18 Q. Now, you send an email to one of your
19 colleagues at RSM, Chris Fitzgerald; correct?

20 A. Correct. Yes.

21 Q. And in that email, you state, "I had a good
22 meeting with the U.S. Attorney's Office.
23 Sounds like the case will fall upon RSM's
24 testimony if they are to bring charges";
25 correct?

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1 A. Correct.

2 Q. And so you were telling the rest of your team
3 that you met with the U.S. Attorney's Office;
4 right?

5 A. Correct. Yes.

6 MS. BROWN: And you can take the pullout
7 down, Tracy, in terms of the magnification.

8 Q. (By Ms. Brown) And the reply from
9 Chris Fitzgerald says "great news"; right?

10 A. Correct.

11 Q. And the "great news" is that you're going to
12 make more money off this case; right?

13 A. No.

14 Q. No, that's not the great news?

15 A. No.

16 Q. So the great news is that -- what is the great
17 news? Tell me what the great news is.

18 A. Well, I said I had a good meeting with the U.S.
19 attorney, right?

20 Chris responded "great news." So he
21 thinks the fact that I had a good, productive
22 meeting with the U.S. Attorney's Office is good
23 news; right? Because there's a lot that goes
24 into calculations. There's a lot that goes
25 into fact-finding. We were currently, at that

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1 point in time, assisting Mr. Comisso/Comisso
2 Law with sharing information with the U.S.
3 attorney with respect to the work we had done.
4 So the fact that we had a good meeting was good
5 news to my team.

6 Q. But you did go on to be retained by the
7 Government in this case; correct?

8 A. Yeah, later down the road.

9 Q. In the following summer -- summer of 2019;
10 right?

11 A. Correct.

12 Q. And you made some money off of that; correct?

13 A. Well, I'm an employee of RSM, so...

14 Q. Well, your company makes money?

15 A. I'm not compensated off of any particular
16 engagement.

17 MS. BROWN: Now I'm going to bring up
18 Exhibit T.

19 (Pre-marked Defendant's Exhibit T
20 introduced.)

21 Q. (By Ms. Brown) And this is another email.
22 And in this email you say, "Call with U.S.
23 attorney went well based on info you provided."

24 A. I'm getting close to the screen because I'm
25 trying to find it.

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1 Q. Yeah, me too. I'm very nearsighted as well.

2 So, I think, Tracy, if you see after the
3 caption it says, "Thank you. FYI." If you can
4 pull that out. Yeah, right there.

5 So it says, "Call with U.S. attorney went
6 well based on info you provided"; correct?

7 A. Correct. Yes.

8 Q. And that is directed at Chris Fitzgerald,
9 Ryan Gilpin, Sean Renshaw?

10 A. The entire team, for the most part.

11 Q. Entire team. Great.

12 You can take the pullout down, Tracy.
13 Thank you.

14 So this -- again, in the month of
15 November, you're talking to the U.S. attorney
16 about the criminal case; correct?

17 A. Correct. Yes.

18 Q. And we already know from back -- in the report
19 in October that you did for RSM -- the internal
20 report -- one of your goals of the criminal
21 case was to recover money for United Way;
22 correct?

23 A. That was a United Way goal -- to recoup its
24 losses.

25 MS. BROWN: Now if I could bring up

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Exhibit F.

(Pre-marked Defendant's Exhibit F
introduced.)

Q. (By Ms. Brown) So this is a very brief email.

It's an email regarding the fact that --

It says, "I have attached the indictment."

And that's from Attorney Comisso; correct?

A. **Correct.**

Q. And so he was sending that information to you on November 29, 2018; correct?

A. **Correct.** Yes.

Q. And you're still employed -- well, you and RSM are still working for United Way at that point -- not the Government; correct?

A. That's correct, yes.

Q. Now, you were hired by the Government -- if I told you July 19, does that sound correct that that's the specific date of your letter with the Government?

A. That does sound about right. Yes.

Q. And I'm referring to document 170-2:6.

You were hired by the Government to, quote, "Update and refine the United Way loss analysis reforms for United Way for purposes of your trial testimony"; do you remember

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1 testifying to that?

2 A. Yes, that's correct.

3 Q. And so, basically, you were hired to take work
4 that you had, quote, "already done" and add to
5 it?

6 A. To evaluate the Government's evidence, right,
7 in conjunction with prior evidence. And where
8 it was consistent, obviously, then that was
9 good. And where there were contradictions,
10 then it would be taken to an accountant. So
11 it's just evaluating new evidence.

12 Q. And so they gave you additional evidence, and
13 you used some of your findings that you had
14 already made in your work for United Way and
15 put that all together; correct?

16 A. Correct. Yeah, so I looked at what they had,
17 and took what already existed, and pulled
18 together what was the most reasonable approach
19 to calculating losses, as well as personal
20 enrichment by Mr. Alrai, which is a completely
21 secondary calculation.

22 Q. Now, you used the word "I," and you used that
23 at trial, too.

24 And at trial, I don't know if you recall,
25 you said, "When I use the word 'I,' I really

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1 mean 'we.'"; remember that?

2 A. Yes, "I" is "we" in just about all my reports.

3 I work for a consulting firm.

4 Q. So I want to talk about that a little bit.

5 So even though "I" means "we," when you do

6 billing on a case, you break it down for each

7 person; right?

8 A. Correct. Yes, most billings.

9 Q. And I'm going to show an example of that right

10 now, which is Exhibit M, which is information

11 regarding the billing records. And if we go to

12 the next page of Exhibit M.

13 So here we can see that there's multiple

14 people working on this case; correct -- and by

15 "this case," I mean working for the Government?

16 A. Yes. Multiple phases and work streams, yes.

17 Q. And in terms of -- well, actually, this is an

18 August bill, but this is your opinions that you

19 had given to United Way. In this bill,

20 United Way -- RSM has billed United Way

21 159 hours. And 23 of those hours were billed

22 by you.

23 Can you see that?

24 A. Yes.

25 Q. And if we could go to Exhibit N, and, again,

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1 the second page. This is September 2018.
2 United Way's billed 397.9 hours, and 21 of
3 those hours were billed by you; correct?
4 A. For all the work streams, yes.
5 Q. And during this period of time through the
6 summer and the fall of 2018, one of the major
7 tasks that you had, or you and RSM, was to look
8 at a loss analysis, finding evidence of loss;
9 correct?
10 A. So both potential losses and internal control
11 evaluation is the phase two -- work stream two
12 of three.
13 Q. But part of it was looking at evidence of loss?
14 A. Yes.
15 Q. Or "loss potential" is the word you used;
16 correct?
17 A. Potential losses.
18 Q. Yeah.
19 And "potential losses" means potential
20 recovery; right?
21 A. Potential losses means that I don't have an
22 opinion as to whether a loss happened until we
23 complete our work; right? So part of it is
24 evaluating whether there was a loss or not.
25 Q. So let's go to exhibit -- we're still on

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1 Exhibit N. It says that Ryan Gilpin billed
2 48 hours.

3 Yeah, that's some -- slightly under
4 "Technology Specialist" -- it's a little right
5 under that, Tracy, if you could pull that out.
6 It starts with "Diego Rosenfeld." That's
7 great.

8 So under "Technology Specialist,"
9 Ryan Gilpin has billed 48 hours for that month;
10 correct?

11 A. Correct, yes.

12 Q. And Diego Rosenfeld has billed one hour;
13 correct?

14 A. Correct. Yes.

15 Q. Who is the more senior of those two people?

16 A. Diego is partner, as is shown here, and Ryan is
17 an associate. So partner is more senior than
18 associate.

19 Q. And so at this period of time, when one of the
20 things you're working on is identifying
21 potential loss, Ryan Gilpin is doing the bulk
22 of the work, at least for the technology
23 specialist; correct?

24 A. That's correct. Yes.

25 Q. Let's go to Exhibit O. So this is Exhibit O.

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1 And this is the October 2018 billing. If I
2 could go to the second page.

3 And if I told you that RSM billed
4 283.8 hours that month, and 26.5 of those hours
5 were billed by you, does that sound correct by
6 looking at this document?

7 A. Correct, for all the work streams, including
8 those that I was leading.

9 Q. And if we could then go to -- that was O -- P,
10 and second page again.

11 And it shows that RSM billed United Way
12 137 hours, and 33.2 hours of those were billed
13 by you; correct?

14 A. Yes, that's correct.

15 Q. And in this case, Ryan Gilpin billed 4.5 hours;
16 correct?

17 A. Yes, that's correct.

18 Q. So when we see billing from Ryan Gilpin, he's
19 under a different subheading than you; right?

20 A. Yes. He's listed as "Technology Specialist."

21 Q. And you're listed under the forensic -- it says
22 "Forensic Team"?

23 A. Yes, that's correct.

24 Q. And by "forensic," that means forensic
25 accounting; correct?

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1 A. "Forensic" incorporates a larger profession
2 than just forensic accounting. For purposes of
3 this? Yeah, I guess it, quite technically,
4 could be a -- renamed "forensic accounting," as
5 that's the primary background for most of my
6 team in this list.

7 Q. And then I'm going to pull up Exhibit Q, which
8 is the January 2019 billing, and go to page
9 two. This is the one we talked about -- the ad
10 hoc work for the U.S. Attorney's Office.

11 And in this billing, you billed 26 --
12 United Way billed 26 hours, and ten of those
13 are billed by you; correct?

14 A. It looks like there's five on top and ten
15 below. So maybe a 15.5 -- 5.5 plus ten.

16 Q. Would this have been the bill that would have
17 included you testifying at the trial?

18 A. This is November 30. This is pre-engagement.
19 I wouldn't have testified at this point.

20 MS. BROWN: And so I'm going to kind of
21 switch gears now to talk about the work that
22 you did for the U.S. attorneys with Exhibit V.

23 (Pre-marked Defendant's Exhibit V
24 introduced.)

25 Q. (By Ms. Brown) And this is October 2019.

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1 So this would be when you were working for
2 the U.S. Attorney's Office; correct?

3 A. Yes. Addressed to Attorney Davis.

4 Q. And if we go to the second page of this, and it
5 shows that there were -- I could see it --
6 203 hours billed in working for the U.S.
7 government, and 38.5 of them were billed by
8 you; correct?

9 A. That's correct, yes.

10 Q. Now, this bill looks a little different because
11 you don't have the subheadings with "Technology
12 Experts" versus "Forensic" that we looked at on
13 the other billing.

14 Am I reading that -- that it is different
15 from the other bill?

16 A. Yeah, it's lacking subheaders.

17 MS. BROWN: And so let's look at
18 Exhibit W, and a second page of that.

19 (Pre-marked Defendant's Exhibit W
20 introduced.)

21 Q. (By Ms. Brown) And that shows 181.2 hours that
22 RSM billed, and 51 of those hours were your
23 hourly billings; correct?

24 A. Other -- so I get 50 -- yeah, 51. Correct.

25 Q. And I mistakenly referred to this earlier, but

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1 this would have been the billing incorporating
2 your testimony; correct?

3 A. That's correct, yes.

4 Q. So you, personally, would have had a higher
5 billing for this period because you were
6 getting ready to testify, and testifying;
7 correct?

8 A. Yes. My recollection is we had already gone
9 over -- we said a set, agreed-upon amount for
10 this work. So we had certainly utilized the
11 full amount that we could in terms of hours
12 we're going to bill.

13 So I guess the best way to look at it is a
14 cap on what we agreed to bill the U.S.
15 Attorney's Office. And for this matter, the
16 volume of work and the amount of work we did
17 exceeded what could be recovered. So I think
18 you see here less time and excess of budget.

19 So -- but, yeah, this looks like -- I'm
20 just reorienting myself with this. So it looks
21 like it's the complete invoice with a credit
22 for excess over our cap.

23 Q. And when you were working for the Government,
24 you still had that duty of confidentiality to
25 RSM?

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1 A. Sorry, I don't understand the question.
2 Q. So you had signed an engagement letter with RSM
3 saying that you had a duty of confidentiality
4 to them; correct?
5 A. United Way?
6 Q. United Way, I'm sorry.
7 A. Yeah.
8 Q. You had a duty of confidentiality to United Way
9 for the work you did for United Way?
10 A. That agreement was still in force, yes.
11 Q. But you're taking some of that work that you
12 did for United Way and incorporating it into
13 the work that you're doing for the U.S.
14 Attorney's Office; right?
15 A. As permitted by Attorney Comisso and
16 United Way, yes -- or were permitted.
17 Q. So in terms of what you were sharing with the
18 U.S. Attorney's Office, you were still under
19 the control of Attorney Comisso, because he
20 still controlled the confidentiality of your
21 previous work; is that how I understand this?
22 A. Well, we had many work streams that we were
23 assisting with. So he operated as a conduit to
24 make sure that what we were turning over was
25 areas that he had agreed to waive privilege.

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1 So, yes, we assisted with the transfer of
2 information.

3 Q. And that role of Attorney Commisso of assisting
4 in the transfer of information -- that
5 continued after you went to work with the U.S.
6 Attorney's Office; correct?

7 A. Where there was information related to the work
8 that we had done while engaged by United Way,
9 yes.

10 Q. So as a hypothetical, if you are trying to put
11 together a report for the U.S. Attorney's
12 Office and you're like, "Hey, there's this
13 document that I remember when I worked for
14 United Way that is real important to this
15 analysis," did you call him up and say, "Hey, I
16 need to go back and use this report so I can
17 incorporate it and give a valid opinion to the
18 U.S. Attorney's Office"?

19 Is that how that work stream is going?

20 A. Well, it sounds like you're coming up with a
21 hypothetical. What I can say is actually what
22 happened, rather than hypothetically.

23 We received a number of requests from
24 either the U.S. Attorney's Office to us, with a
25 cc to Attorney Commisso; or to Attorney

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Comisso and then passed along to us where certain information was being sought. And when those requests came in, we made every effort to share everything and anything that was responsive to those requests in consultation.

Q. You said you "made every effort to share everything" that was covered by their requests?

A. Yes. So I would ask the team to look through the -- our system of record, which is our server folders, and share all responsive materials that were relevant and available.

Q. So if the U.S. Attorney's asked for it, you'd go find it and give it to them?

A. We would hand it to Attorney Comisso and/or send it directly to the U.S. Attorney's Office with a cc to Attorney Comisso.

Q. So it sounds like there's at least two streams. Sometimes there's a direct stream when you decide it's important and give it directly to the U.S. Attorney's Office; and then sometimes, you're filtering it through Attorney Commissio as a stream to get it to the U.S. Attorney's Office; is that correct?

A. Well, yes, it would -- and we're working in the mode of not staring at any documents. I'm

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1 happy to stare at any documents you have.

2 But the general praxis was, if there was a
3 volume of information that we thought couldn't
4 easily be discussed with Attorney Commisso, we
5 would send it to Attorney Commisso for his
6 review. If it was easy enough to discuss over
7 the phone or through maybe even a Webex, talk
8 through the documents, and then share them
9 directly with a cc to Attorney Commisso.

10 Q. But what I'm not understanding is if you have
11 this duty of confidentiality to the United Way,
12 wouldn't, in theory, you have to go through
13 Attorney Commisso for everything that you give
14 to the Government?

15 A. And that's what we did, yes. In one way,
16 shape, or form, Attorney Commisso was apprised
17 and aware of the documents that we were sharing
18 with the U.S. Attorney's Office.

19 Q. So Attorney Commisso was deciding what the
20 Government was going to get for evidence in
21 this case?

22 A. Was he reviewing his -- the documents for those
23 that remained under privilege?

24 Q. No, I'm just saying that, as I understand what
25 you're saying, the Government would make a

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1 request to you saying, "We need something
2 related to" -- whatever. Fill in the blank.

3 And then you would go to Attorney Commiss^o
4 and say, "They want this. Can we give it to
5 them?"

6 And he'd say "yes" or -- well, he always
7 said yes. Can you say that he always said
8 "yes" and he never said, "No, we're not giving
9 that to you," or do you know?

10 A. I don't recall any instances where he said,
11 "Don't share that," no.

12 Q. So if the Government was looking for it, he
13 always shared it; correct?

14 A. As long as it was in his -- if there was no
15 privilege issue, then, yes, it would be shared.

16 Q. And are you aware of Attorney Commiss^o
17 asserting a privilege to something that you
18 thought the Government should have?

19 A. No.

20 Q. So you're their expert witness, and they say,
21 "We need this information."

22 And you go to Attorney Commiss^o and say,
23 "Hey, we need to share this information."

24 And he says, "Yes," every time you
25 remember?

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1 A. Yeah. I mean, that's my recollection
2 generally. And I don't determine what's
3 privileged. I mean, that's -- well, everything
4 I did with him was privileged; right? So
5 determining what was a -- can be waived -- I
6 viewed that as his role.

7 Q. And so -- but he ultimately would be the
8 gatekeeper as to what the Government would get
9 from you in your role as an expert for the
10 Government?

11 A. Correct.

12 Q. So when you were working for the Government,
13 the Government was giving you instructions;
14 right?

15 They've retained you, and they'll say, "We
16 want you to write a report about 'X,' 'Y,' and
17 'Z"'; right?

18 A. Correct.

19 Q. And during that same period of time, you're
20 also working with Attorney Commisso to protect
21 the privilege of United Way and protect their
22 interests; correct?

23 A. Yes. There's multiple work streams, multiple
24 different tasks that were assigned as part of
25 making sure we didn't cross wires in everything

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1 we shared.

2 Q. But they were similar objectives; right?

3 A. Similar objectives between...

4 Q. To help the prosecution of the case against
5 Mr. Alrai?

6 A. So the objective with working for the U.S.
7 Attorney's Office was to prepare a loss
8 quantification, right, and an unjust
9 enrichment. And we assumed, right -- or I
10 guess I assumed that a fraud occurred.

11 With respect to United Way, we were
12 assisting with various fact-finding. People at
13 RSM were doing discovery services. We had a
14 variety of different roles. We were assessing
15 internal controls and vulnerabilities to them.

16 So there was a number of various, quote,
17 unquote "objectives" that were quite dissimilar
18 and unrelated to --

19 Q. But one of those objectives was to determine a
20 loss -- to quantify loss regarding the
21 allegations against Mr. Alrai; right?

22 A. Correct. That included the loss
23 quantification, yes.

24 Q. And as we saw from the report to the
25 United Way, one of the objectives was to

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1 recover that loss through the criminal
2 prosecution?

3 A. Correct.

4 Q. So that objective was identical; correct?

5 A. Well, that was United Way's -- I think you said
6 United Way's goal -- objective?

7 Q. Well, you're working for two entities in this
8 case. So you worked for United Way, who is
9 identified as the victim in this case; correct?

10 A. Correct.

11 Q. And you've worked for the Government, who is
12 the prosecution in this case; correct?

13 A. Correct.

14 Q. So you have worked for both of them.

15 And both of them have an identified
16 interest in getting money from Mr. Alrai
17 through the criminal prosecution?

18 A. Correct.

19 Q. That's the same for both United Way and the
20 Government?

21 A. That's my understanding yes.

22 Q. Now, in addition to your work for the
23 Government as an expert witness and your work
24 of writing a report for the United Way, you
25 also helped put together an investigation for

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1 an insurance claim that the United Way made
2 regarding the facts in this case; correct?

3 A. There's an insurance claim, yes.

4 Q. And you're working on that back in the fall of
5 2018 as well, when you were still working for
6 United Way?

7 A. That's correct.

8 Q. And we saw a little bit about that in that
9 slide we pulled up when we first started
10 talking about -- that was one of the potential
11 sources of recoveries -- was this insurance
12 claim; correct?

13 A. Correct.

14 Q. And if I read that slide correctly, was the
15 insurance claim on employee theft capped out at
16 \$1 million?

17 A. That's my recollection, yes.

18 Q. So I want to ask you about that insurance
19 claim.

20 You helped come up with some of the
21 numbers and the calculations that were put into
22 that claim; correct?

23 A. That's correct, yes.

24 MS. BROWN: If we can pull up Exhibit Ww,
25 specifically at page four.

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(Pre-marked Defendant's Exhibit Ww
introduced.)

Q. (By Ms. Brown) So we'll start at the beginning -- it says "Insured Proofs of Loss" -- and then we'll go to four.

Do you recognize this document?

A. Starting on page four, yes, it looks familiar.

Q. And I'm going to specifically ask you about -- actually, if you can go back one page. I think it might be at the bottom of the previous page that I was going to ask about. Sorry. Okay.

At the bottom, Tracy, if you can pull out that bottom paragraph above the footnote section. Thank you.

And it says, "United Way has various controls in place to prevent misconduct, including potential employee theft; however, Alrai circumvented these controls and the controls in place. And the associated breaches of such controls by Alrai included, but are not limited to" -- and now we can go to the next page.

And then it describes the actions of Mr. Alrai in page four; correct?

A. It appears so, yes.

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1 MS. BROWN: And just for the Court's
2 summary, this document was produced prior to
3 trial. I know the sections before, I was
4 talking about invoicing. That was not -- none
5 of the invoices that we referenced were
6 produced prior to trial.

7 So I'm going to go on to the next exhibit,
8 which is Exhibit Z.

9 Q. (By Ms. Brown) This is back -- we talked
10 about this at the beginning of your
11 examination. This is the report you did for
12 the United Way. And I'm going to go page 32.
13 I think we're at page 30 now. Yeah, 32.

14 So one of the things in the report for the
15 United Way was something that was called "root
16 cause analysis"; correct?

17 A. Correct, yes.

18 Q. And if we look on this page at B, one of the
19 things -- root cause analysis means "why did
20 this happen? Why did this alleged theft happen
21 to United Way"; correct?

22 A. Correct. Yes.

23 Q. And section B, the answer is "lack of adherence
24 to RFP policies and procedures. Explaining RFP
25 policies and procedures appear to be poorly

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1 drafted and communicated and were circumvented.
2 The RFP process was overridden, circumvented in
3 five key instances."

4 It explains that "managed IT services, RFP
5 service did not have clearly documented RFP
6 procedure requirements or adequate technical
7 oversight"; do you see that?

8 A. Yes. Correct.

9 Q. And then the next sections talk about "there's
10 no evidence of an RFP for telephonic services
11 which were awarded to DigitalNet"; correct?

12 A. Correct. Yes.

13 Q. And section three says "no evidence of an RFP
14 for infrastructure hosting and virtual desktop
15 services order to DigitalNet, and failure to
16 identify duplication of services with those
17 performed by DigitalNet." That's included in
18 that report as well; correct?

19 A. That's correct.

20 Q. And, finally, "No evidence of an RFP for ad hoc
21 web development services all awarded to
22 DigitalNet"; correct?

23 A. Correct.

24 Q. So in this report that you gave to the
25 United Way, you found serious problems with the

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1 RFP policies and procedures at United Way
2 during Mr. Alrai's tenure; correct?
3 A. That's correct, yes.
4 Q. Those serious concerns about United Way's RFP
5 policies and procedures did not make their way
6 into the insurance request for the insurance
7 claim, did they?
8 A. I'm not sure.
9 Q. Well, we just read from that which is
10 Exhibit Ww that United Way's policies and
11 procedures require due diligence be performed
12 to obtain information about prospective
13 vendors.
14 That doesn't sound like, at least as to
15 what you're saying to the insurance company,
16 that there were any problems with United Way's
17 RFP process, does it?
18 A. Well, that's a statement, right, of fact with
19 respect to what the requirements were, yes.
20 Q. Okay.
21 A. And this is a statement of fact to where some
22 of the gaps occurred.
23 MS. BROWN: So I'm going to ask -- Tracy,
24 bring up exhibit --
25 THE COURT: Wait a minute.

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1 So, Ms. Brown, this document -- I'm a
2 little bit -- I just got confused.

3 MS. BROWN: Oh, good. I'll try to
4 clarify.

5 This was produced prior to trial,
6 Your Honor. So this is what I just talked
7 about -- which is Z was produced prior to
8 trial. It basically was the report that RSM
9 gave to United Way regarding their
10 investigation.

11 The document right before that was a
12 document that was sent to United Way's
13 insurance company asking for claims. Both of
14 these were provided to counsel before trial.
15 They establish the foundation for the next
16 document I'm going to, which was not produced
17 prior to trial, which is Exhibit Oo. So I'm
18 glad you asked that just so I could clarify.

19 THE COURT: But you were just asking her
20 about whether it was -- I don't know -- relied
21 on, considered, produced, I don't know what --
22 with respect to the insurance coverage issue.

23 MS. BROWN: Well, I think what the Defense
24 is arguing is that there are different reports
25 finding different things, and that that would

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1 go to the credibility of this witness.

2 THE COURT: Okay.

3 MS. BROWN: Because one report doesn't
4 mention any problems with the policies and
5 procedures regarding prospective vendors, and
6 the other one finds serious problems with those
7 procedures. So these both were given to
8 counsel prior to trial.

9 The next document is an email that
10 discusses these two issues that was not
11 provided prior to trial; does that make sense?

12 THE COURT: It does.

13 MS. BROWN: So exhibit --

14 THE WITNESS: Just to --

15 MS. BROWN: I'm sorry.

16 THE WITNESS: Can I clarify on the record?

17 THE COURT: Sure.

18 THE WITNESS: So you made reference to the
19 other document being drafted by RSM. That's a
20 document that came from United Way.

21 MS. BROWN: And by "United Way," do you
22 mean Attorney Comisso?

23 THE WITNESS: Correct, yes.

24 MS. BROWN: Thank you for clarifying that.

25 THE COURT: Well, did you have any role in

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1 drafting that document?

2 THE WITNESS: We did, yes. We shared
3 information that went into the formation of the
4 document, including the loss analysis.

5 THE COURT: The one that went to the
6 insurance company?

7 THE WITNESS: The calculation, yes -- the
8 loss calculation.

9 THE COURT: Yeah, the document we were
10 just talking about?

11 THE WITNESS: Correct, yes.

12 THE COURT: Okay.

13 Look, it's been 90 minutes for the
14 reporter, so we're going to take the normal
15 break. Just to let -- I want to have a brief
16 conversation, though, with Counsel about this.

17 So we'll take a 15-minute break and then
18 we'll reconvene. I've got a 12:30 meeting
19 today, so you should plan your lunch hours for
20 12:30, about an hour for lunch.

21 Let me ask a question here, though,
22 Ms. Brown. And I don't quibble at all with
23 your presentation. But I have to wonder out
24 loud, I just -- I understand you're trying to
25 meet your burden. You're trying to show that

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1 evidence was exculpatory that should have been
2 produced. And, B, because it goes to
3 credibility, both in terms of competency and
4 bias. And, B, that it was prejudicial; right?

5 I guess what I'm wondering is this.
6 Because you're obviously very much in the
7 weeds, and I really don't have a problem with
8 that. But what would be the difference --
9 like, suppose I granted your motion, and then
10 we either had a new trial or we took
11 Mr. Hunter's proposal and we had a do-over on
12 some witnesses, whether it was just cross or
13 directed cross; right?

14 I guess the question is, what would be the
15 difference between what you're doing today and
16 what that proceeding would look like? It
17 sounds like you'd do the exact same thing;
18 right?

19 MS. BROWN: Correct, Your Honor, except
20 now we're going to have -- so, two things.
21 It's a real easy -- so one thing that would be
22 different is now we're going to have ammunition
23 to impeach this witness that we didn't have.
24 And the second part of that, which is our next
25 witness, which is our expert, who will say

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1 several things, and we anticipate will say --

2 THE COURT: I don't want you to proffer
3 what the expert's going to say.

4 MS. BROWN: Oh. Okay.

5 THE COURT: Oh, actually, wait a minute.
6 The experts can listen to each other, so it's
7 fine. But here's my point again.

8 Same question, though; right? Because now
9 you have what you call the "ammunition," which
10 would be the discovery; right? But, again, how
11 is it going to look any different than what you
12 just did? The only reason I ask -- it's really
13 not a critique, because it's interesting
14 information -- it really is.

15 But I guess it's almost a situation where
16 there's an analogy to the Suzanne Brown case.
17 You called your expert. I heard what she said.
18 And I've got to make a decision about whether
19 it would affect the outcome; right? And in
20 this case, it's even closer to the road,
21 because I'm the trier of fact.

22 And it's not meant to be a challenging
23 question, or even rhetorical, but what you
24 would do at trial is what you're doing right
25 now; right? Because you have the ammunition

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1 now.

2 MS. BROWN: Yes. Right. And that's our
3 burden of showing how it could have been a
4 different result -- is by going through this
5 witness and showing the things that we weren't
6 able to show.

7 THE COURT: I'm just wondering -- I'm just
8 wondering if there's a different way to do it,
9 only because -- it's very important, but it's
10 also very time-consuming. And if this is going
11 to be exactly what happens again if I grant the
12 motion, I just wonder if there's a shorter way
13 to do it. That's not to suggest, though, that
14 I know what it is, because I don't.

15 I want Counsel to think about that maybe
16 over the break. It doesn't have to be over the
17 morning break. We can talk about it over lunch
18 or something. But this seems like a process
19 that is kind of -- it's not just a peek into
20 what should have been -- allegedly should have
21 been produced and its impact. It's literally
22 the entire proceeding, which -- sounds like we
23 would almost just do over again, or just use
24 the record of this proceeding.

25 It's a strange kind of procedural posture

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1 we're in here, and perhaps Counsel will have a
2 suggestion for the Court. I'm not asking you
3 to do it right now. We'll take a 15-minute
4 break. And then, again, assume a 12:30 lunch
5 break.

6 We're in recess for 15 minutes.

7 (Brief recess taken at 10:47 a.m., and the
8 proceedings resumed at 11:04 a.m.)

9 THE COURT: Back on the record.

10 Defense Counsel, you may proceed.

11 MS. BROWN: If we can pull up Exhibit Oo.

12 (Pre-marked Defendant's Exhibit Oo
13 introduced.)

14 Q. (By Ms. Brown) And just to give some context
15 both to the Court and Mr. Naviloff, before the
16 break, we spoke about -- one of the duties that
17 RSM and yourself had for United Way was putting
18 together a report that was submitted on an
19 insurance claim; correct?

20 A. Sorry.

21 Is that question for me?

22 Q. Yes. I was just giving some context where we
23 are -- that we had talked about the insurance
24 claim that RSM assisted Attorney Commisso in
25 terms of submitting to the insurance company.

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1 A. Yes. That's our last discussion, yes.

2 Q. So in the context of that, I'm going to ask you
3 about an email exchange that is documented in
4 Exhibit Oo.

5 And just for the Court's benefit, this is
6 a document that was not produced prior to
7 trial. It was produced as part of the Court's
8 recent discovery order.

9 So this document we're looking at is from
10 Ryan Gilpin -- at least the last email that
11 we're looking at at the top. And it's to
12 yourself, and Chris Fitzgerald, and Ron Nahass
13 -- is that how he pronounces it?

14 A. Nahass is, yep, correct.

15 Q. And these are the team people at RSM who were
16 working on the United Way case involving
17 Mr. Alrai; correct?

18 A. Yes, that's correct.

19 MS. BROWN: So I'm going to ask the clerk
20 to scroll down to get to the beginning of this
21 email exchange here. So it would be -- go back
22 one page. Okay.

23 Q. (By Ms. Brown) So this email exchange starts
24 with an email from another accounting firm;
25 correct?

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1 A. That's correct, yes.

2 Q. And so on page three of Exhibit Oo, this is an
3 email from this other accounting firm -- that
4 they are representing Chubb insurance company
5 regarding the claim of United Way in terms of
6 the theft claim; correct?

7 A. That is correct, yes.

8 Q. And the accounting firm that's representing
9 Chubb sends this email to Attorney Commissio.
10 And it says that "Good afternoon, John.
11 As you may be aware, we were the forensic
12 accountants retained by Kimberly Russell of
13 Chubb to assist in the analysis of the
14 above-captioned matter. Based on our analysis
15 of the documentation provided to date, we
16 attached our follow-up request letter. If you
17 have any questions or comments, please feel
18 free to contact me"; correct?

19 A. Correct.

20 Q. So that wasn't sent to you, but indirectly it
21 was, because then Attorney Commissio forwarded
22 it to you, correct, by email?

23 A. Yes. That's correct.

24 Q. And if we can go back a page, which would be
25 page two of Exhibit Oo. So he, on this page at

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1 the bottom of the page -- this email's being
2 forwarded to you.

3 And so he explains he's forwarding this
4 letter from the accountants for Chubb about
5 reviewing the proof of loss claim; right?

6 A. That's correct, yes.

7 Q. And it says, "As you can see from the letter,
8 several requests for further documents,
9 analysis, and information about RSM's loss
10 calculation. It appears they are auditing
11 RSM's work as well as United Way's internal
12 controls"; correct?

13 A. That's correct.

14 Q. And Attorney Commisso goes on to say, "Please
15 review and let me know when you are available
16 to call to discuss"; correct?

17 A. Correct.

18 Q. And "we would like you to put together a plan
19 to prepare a response. We need to understand
20 the most efficient division of labor and who --
21 we need to budget for anticipated cost";
22 correct?

23 A. Correct.

24 Q. And after that, Attorney Commisso says that
25 "the total spend for the IT investigation is

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1 over \$1 million"; right?

2 That's what that says; right?

3 A. Correct.

4 Q. You understand that he's saying, "We've already
5 spent \$1 million on the investigation in this
6 case. We need to start budgeting here,"
7 basically; is that how you took that email?

8 A. I took this email as he was looking for a
9 budget for the response to this inquiry.

10 Q. And then if we can go to the top of that email,
11 that same page would then be an email that --
12 so did you forward this email to the rest of
13 your team? Or was this -- let me see.

14 It looks like you're the only one from RSM
15 copied on the email from Attorney Comisso;
16 correct?

17 A. Correct.

18 Q. So if we can go back a page to the first page
19 of this document, Oo.

20 So it looks like you then forwarded to
21 your team, who is Chris, Ryan, and Ron;
22 correct?

23 A. Correct.

24 Q. Diego Rosenfeld isn't on that team, is he?

25 A. He's not on this email.

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1 Q. And so you direct that email to your team at
2 RSM, including Ryan Gilpin; right?

3 A. Correct.

4 Q. And you tell them that "we will need to come up
5 with an estimate of hours, pulling information
6 requested by forensic accountants hired to
7 examine United Way's claim."

8 So you're directing them that they need to
9 put together a budget to shore up this claim;
10 correct?

11 A. We need to come up with an estimate of hours to
12 collect information that they're looking for.

13 Q. And you put that in different categories;
14 correct?

15 A. Where do you see that?

16 Q. Well, let's pull out the paragraph -- the
17 second paragraph from the bottom on the page
18 we're on right now, which is page one.

19 And it says "duplicate billing."

20 A. Uh-huh.

21 Q. So there you instruct your team to "please
22 explain how it was verified that DigitalNet did
23 not perform any of the services claimed as
24 duplicative billings. CF" --

25 I'm assuming that's "Chris Fitzgerald"?

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1 A. Yes. Well --

2 Q. Sorry -- what?

3 A. So this section is -- if you read above, this
4 is where I said we need to potentially prepare
5 some written explanation in response to,
6 presumably, some of the forensic accountant's
7 questions that were asked.

8 Q. So you, as to the issue of duplicate billing --
9 so they must have had questions about your
10 claim of duplicate billing; correct?

11 A. Yes, but that's my understanding here. I
12 haven't seen the file that was potentially
13 attached to this or associated with this.

14 Q. We don't have it either. Otherwise, I'd show
15 it to you.

16 So you direct your team to "please explain
17 how the document billing was verified that
18 these services were not performed." And you
19 specifically direct CF, being Chris Fitzgerald,
20 "this will be a quick, straightforward
21 explanation"; correct?

22 A. Correct.

23 MS. BROWN: Tracy, if we can go down in
24 the next paragraph that start with "Excessive
25 billing."

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1 Q. (By Ms. Brown) So in this paragraph of your
2 instructions to your team -- and I'm assuming
3 "6A" is referencing this letter that we don't
4 have -- "detail how the monthly office phone
5 line count was determined for FY 2013 through
6 2018. Please provide any and all supporting --
7 documenting the phone count for each year."

8 And it says "Greg." Are you directing
9 that to yourself, or...

10 A. Yeah, I'm not sure on this, based on this.

11 Q. I'm not either. That's why I'm asking.

12 So it says "Greg, don't think we know
13 this, but can indicate how the phone line count
14 compared to head count."

15 Do you know what that's talking about
16 there, when it says "phone line count compared
17 to head count"?

18 A. Yeah. I think there was some initial question
19 as to -- before the facts were gathered as to
20 how we knew it, and whether or not we had
21 the -- a phone line count or head count. But
22 it appeared that Chris Fitzgerald said they
23 used a number of phone lines that were stated
24 on DigitalNet invoices. So the basis for which
25 the calculation was calculated was known to

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1 Chris.

2 Q. Chris Fitzgerald was doing the calculation as
3 to whether there was excessive billing as to
4 the phone services?

5 A. Chris was familiar with the model, and this was
6 my attempt to have someone quickly look at the
7 model and pull out the answers to these
8 questions. So Chris went back to the model and
9 pulled out these answers.

10 Q. And Chris is not an IT guy, for lack of a
11 better word; right?

12 A. Chris is also a forensic accounting -- he's in
13 our forensic group.

14 Q. So were you instructing Chris to go back and
15 get the necessary information regarding the
16 calculation on the alleged excessive billing as
17 to the phones? Or is this him giving his
18 answer to that?

19 A. This is him just going back to our work papers
20 and pulling in the relevant response for
21 purposes of responding to the forensic
22 accountants who were reviewing our claim.

23 Q. And, at least, it sounds here that the way he's
24 doing that is basically counting up how many
25 phone lines there are.

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1 A. Correct.

2 MS. BROWN: Tracy, if we can go to the
3 next page, which, I guess, would be page two of
4 Oo.

5 And pull out the first half of it,
6 basically up until "RSM."

7 Q. (By Ms. Brown) So Ryan Gilpin is on this
8 exchange as well; correct?

9 A. Yes.

10 Q. And he sends an email saying he's "attached his
11 initial draft of a memo on data management and
12 backup that I believe Chris had later refined";
13 correct?

14 A. Correct, yes.

15 Q. And so this email tends to suggest that Ryan's
16 doing the calculation and the comparisons
17 regarding data management and backup; correct?

18 A. I think this refers to the scan that was done
19 and the analysis related to observing whether
20 or not there were backups. So I think he had
21 jotted some notes with respect to what was
22 being backed up and made it available to Chris,
23 again, to the extent he didn't already have
24 some notes in his files.

25 Q. So it doesn't say "notes."

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1 It says "draft of a memo"; right? We
2 agree that that doesn't say "notes" -- it says
3 "draft of a memo"?

4 A. Yep. Correct.

5 Q. And it says "draft of a memo on data management
6 and backup"; correct?

7 A. Correct.

8 Q. And it sounds like from this that Ryan Gilpin
9 is the one who's writing that draft of a memo
10 on data management and backup; right?

11 A. That's correct, yes.

12 Q. It sounds like Chris refined it later; right?

13 A. It says, I believe, "Chris had refined,"
14 meaning this may have been an old draft of
15 something that Chris had looked at.

16 This appears to be just transient
17 communications with respect to discussions that
18 went into formulating, ultimately, the claim
19 that was presented.

20 MS. BROWN: Tracy, can we go back to page
21 three of Exhibit O?

22 And can we pull out that paragraph that
23 says "Services not performed," not quite
24 halfway down? Thank you.

25 Q. (By Ms. Brown) So, again, this is still that

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1 exchange going on regarding the insurance
2 company request.

3 And it has an "8." Again, I'm assuming
4 that corresponds to a letter.

5 It says, "Please explain how DigitalNet
6 invoiced costs of \$592,250 for data management
7 and high-availability backup storage, paid
8 during FY2013 through FY2018, were determined
9 to have been performed."

10 That sounds like that's what the insurance
11 company's accountants are asking for; right?

12 A. Yes. They're specifically asking us for
13 information on this. This is one where we
14 ultimately determined from John Meyer, CVS
15 consulting, that -- his opinion was these were
16 rendered, which was consistent with our initial
17 assessment throughout this process.

18 And it looks like Ryan emailed around
19 making reference to the explanation. I think
20 that's what was attached that you were
21 sharing -- that he had some explanation as to
22 what we had seen through the scans, which were,
23 once again, made available -- showing that
24 scans weren't being captured of the IT
25 environment.

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1 And then it says -- Chris replies -- CF
2 says, "Yes, I believe we have an explanation
3 somewhere in the files."

4 And "Ryan, would you be able to find this
5 explanation and circulate?" So it looks like
6 there was discussions and documents that were
7 transient in nature with respect to information
8 that they had to dig up and share.

9 Q. So I just want to understand this.

10 So if I understood your explanation
11 regarding this issue, Ryan interviewed
12 John Meyer about this topic. Then Ryan
13 generated a report about that and circulated it
14 to the rest of you. That became part of your
15 findings.

16 Am I getting that correct?

17 A. For purpose of this analysis, we -- I don't
18 know what, ultimately, was shared with the
19 forensic accountants here, but my recollection
20 here is that, yes, we had interviews with
21 John Meyer. John Meyer's recollection of -- or
22 views with respect to high-availability backups
23 aligned with our analysis and the network scan
24 that was explained to me and shown to me. And
25 that it was my opinion, for purposes of

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1 preparing information for these forensic
2 accountants, that the high-availability backup
3 storage did not take place, according to
4 John Meyer and the documents that were
5 explained to me with respect to --

6 Q. So are there documents somewhere that
7 memorialize what John Meyer told you about this
8 data management high-availability backup
9 storage?

10 A. My understanding is there was a number of
11 informal conversations that we had with
12 John Meyer. I know that, generally speaking,
13 we had spoken with him on a number of
14 occasions.

15 So -- and I know, as a matter of all of
16 our interviews, we didn't maintain formal
17 notes. So those would have been transient in
18 nature. Any relevant information would have
19 made their way into one of these reports, as
20 far as any indication of what we learned or
21 found that was relevant to our overall
22 conclusions.

23 Q. And that's what I understood you to say a few
24 minutes ago -- that the interviews with Meyer
25 on this issue were memorialized in a report

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1 that Ryan did that was emailed around to
2 everyone explaining this issue.

3 Was that -- I'm just trying to understand
4 that. Is that what happened?

5 A. No. I mean, I remember seeing a network scan
6 that showed there were two servers that were
7 backed up. And just about everything else was
8 a two out of -- I think there was a number on
9 it in an email that he sent me.

10 And then with the desktop, similar -- it
11 was some count out of a much larger count that
12 may have received some sort of backup. But the
13 way it was explained to me is that there was no
14 software found that was backing up any of the
15 networks on a real-time basis. And, certainly,
16 for purposes of geographically dispersed high
17 availability, the threshold wasn't being met in
18 terms of what we found as evidence in the
19 files.

20 So these were largely verbal discussions
21 that I had, or an email or two that showed me
22 the accounts combined with the report that was
23 shared with the Defendant which shows the scan
24 that took place. And whether that was Meyer
25 that did the scan or whether that was our

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1 software, I don't recall at this moment. But
2 the scan was part of what was shared with me,
3 along with John Meyer's conclusions on this.

4 Q. So John Meyer isn't mentioned anywhere in this
5 paragraph, is he?

6 A. In this paragraph?

7 Q. No.

8 A. Not this specific one, no.

9 Q. Because if you read this paragraph, it sounds
10 like Ryan Gilpin is in charge of emailing
11 around an explanation about how he became aware
12 of this problem; right?

13 A. Well, yes, Ryan is emailing us with respect to
14 high availability and what he had seen in terms
15 of his fact-finding. And with that, the basis
16 of his analysis was a high -- or a report -- a
17 network scan that showed what was being backed
18 up and what wasn't. And those key data points
19 were shared to me via email.

20 Q. And -- but the analysis was done by
21 Ryan Gilpin; right?

22 A. Like, what analysis?

23 Q. I thought you just said that he did the
24 analysis of this issue and sent you an email on
25 it.

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1 A. Sorry.

2 The summary -- summary of the snapshot of
3 what was being backed up. Summary analysis?

4 Q. Oh, you didn't want "analysis"?

5 A. "Analysis" is fine.

6 Q. Okay. Because that's what I thought you said.

7 So this is all after you get this question
8 from the insurance company to have more
9 documentation about your claim losses; right?

10 A. Correct.

11 Q. Now, this document, Exhibit O -- this was
12 not -- as far as you know, was not shared with
13 the Government or the Defense prior to trial;
14 right?

15 A. This is part of, I'm guessing, the 600-plus
16 emails that were turned over.

17 Q. After trial; right?

18 A. Yes.

19 Q. Yes, you are right. It was part of the
20 600-plus emails that were turned over after
21 trial.

22 But my question was, as far as you know in
23 your role as the expert for the Government,
24 this was not turned over prior to trial; right?

25 A. Correct. With respect to the 600-plus, we

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1 opted for an openly conservative approach,
2 where we produced anything and everything that
3 related to our work to date. And that included
4 transient emails such as this one, that
5 contained some of our thoughts and impressions
6 at the time that we were preparing some drafts.

7 Q. Well, this email is more than just thoughts and
8 impressions. This email is that an insurance
9 company does not think you have given
10 sufficient documentation for your claims of
11 loss.

12 That's kind of a significant email;
13 wouldn't you agree?

14 A. I wouldn't interpret it that way, no.

15 Q. How would you interpret it?

16 A. They were looking for further detail with
17 respect to the report we shared. So it's part
18 of a back-and-forth with any insurance claim.
19 There's going to be questions. So you're not
20 going to prepare a claim for a \$1 million-plus
21 dollars with an insurance carrier without them
22 asking you questions.

23 Q. But, again, you didn't share this with the
24 Government prior to trial; correct?

25 A. That is correct.

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1 Q. And you didn't share the fact that some of the
2 persons who are doing the analysis on
3 explaining these issues, such as services not
4 provided, was a new associate; correct -- you
5 didn't share that with the Government either?

6 A. Define "new associate."

7 THE COURT: Everybody, let's not jerk each
8 other around. Let's just ask questions and
9 answer them. We all know what we mean. Let's
10 not play games.

11 THE WITNESS: Okay. So, say, Ryan Gilpin.

12 Q. (By Ms. Brown) So you would agree he would fit
13 the definition of a young associate at your
14 firm?

15 A. Yeah, he's a second-year associate. I believe
16 he was promoted to senior associate at this
17 time.

18 Q. And you did not share with the Government the
19 fact that when you were questioned about some
20 of the findings, that you relied on Ryan Gilpin
21 to make some of that analysis?

22 A. The work performed is all under my supervision
23 and under my quality control. This is an area,
24 particularly with respect to the loss claim,
25 that I explicitly state in the report and

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1 stated at testimony that John Meyer had
2 testified and opined on this. And this is part
3 of my reliance on my expert report.

4 Q. But my question was, you did not share with the
5 Government that you relied on Ryan Gilpin to
6 make some of the calculations in this case?

7 A. I didn't rely upon Ryan to make any
8 calculations. He worked under my direction and
9 control. Calculation is mine. I prepared it.
10 And I presented this loss analysis; right. So
11 Ryan assisted with gathering evidence and facts
12 and putting them into spreadsheets for me to
13 review and to perform quality control
14 procedures.

15 THE COURT: Attorney Brown, let me just
16 ask you, because we've been on this issue here
17 for a while. Other than Gilpin's undisclosed
18 role, is there anything more I'm supposed to be
19 gleaning from this?

20 MS. BROWN: I think this document is
21 exculpatory on several levels: That the RSM
22 was questioned regarding their documentation.
23 And that in the -- when Mr. Naviloff sought
24 help to shore up this documentation, he didn't
25 go to the person with 20 years' experience --

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1 he went to the person with two years'
2 experience.

3 We'll come back to this again when our
4 expert testifies. He'll explain a little bit
5 more about some of this. So I just wanted to
6 set that up, but they'll be more on that
7 through our expert later.

8 THE COURT: I know. But we don't have a
9 jury here, so I'm just asking you questions.

10 MS. BROWN: No, that's great.

11 THE COURT: And I think I understand.

12 So it's not just Gilpin's role, which was
13 unknown to defense counsel when he
14 cross-examined this witness; but it's also the
15 idea that there was some pushback from the
16 carrier regarding the loss amount; right?

17 MS. BROWN: Correct. And, also, this
18 document gives us a little bit more -- lack of
19 a better word, peek behind the curtain as to
20 how these opinions were formed, which will
21 become more important with our expert.

22 Q. (By Ms. Brown) I think we talked about this a
23 little bit before, so I'm not going to go into
24 a lot of detail.

25 But you were involved in the discovery

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process in this case in terms of giving documents to the Government; correct?

A. That's correct, yes.

(Pre-marked Defendant's Exhibit X
introduced.)

Q. (By Ms. Brown) And I want to talk about Exhibit X, which is an email where you and members of your team talk with Attorney Commissio about the presentation to the United Way that we discussed earlier. So that's in Exhibit X. Now if we could pull up the first sentence beyond the caption of the parties in the email.

It says "happy to discuss."

So in this part of the email, it says -- and we'll get to it in a minute, but it says, "Happy to discuss. Perhaps as much a question of privilege and what would be available to Imran if he is charged and requests docs as part of discovery."

That is something -- so would it be fair to say that based on this email, you were thinking about what Mr. Imran might or might not get if you produced documents to the Government?

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1 A. No. My concern here is my team was discussing
2 content for purposes of presentation, where
3 that fell upon John Commisso --
4 Attorney Commisso to determine what was being
5 presented to whom. Because there's various
6 constituents -- different special committees
7 and different committees that information was
8 being presented to.

9 So it had everything to do with letting
10 Attorney Commisso decide what information was
11 being shared with whom, particularly since some
12 of those -- at least my understanding was some
13 of those individuals were further from the
14 special committee that was charged with our
15 oversight -- the investigational oversight --
16 being clear to my team that some people are
17 going to receive information who may be outside
18 the sphere of privilege.

19 Q. But you knew that if you shared certain
20 information, Mr. Alrai would get that
21 information; correct?

22 A. Not necessarily. I'm just making clear that
23 the word -- matters of privilege fall upon
24 Attorney Commisso to decide. And that comes
25 down to what information he wants to share.

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1 Q. You discussed earlier that Attorney Commiss~~o~~
2 never said, "Oh, I'm worried that the
3 Government might get this and it might help the
4 Government's case"; he never said that, did he?

5 A. No. No, he didn't express any concern with me
6 with respect to any specific document during
7 the course of our work. I believe he trusted
8 us to mark things as privileged and
9 confidential, which we did, and allow him to
10 determine in terms of content for the various
11 constituents what information went into those
12 presentations.

13 Q. This is dated October 4, 2018; correct?

14 A. Correct.

15 Q. And we -- from a previous email, Mr. Alrai
16 didn't get indicted until -- I think it was
17 November 28, 2018; right?

18 A. Correct.

19 Q. So this is almost two months before he's even
20 indicted, but you're thinking about what he
21 might get in discovery; right?

22 A. I'm instructing my team that they should be
23 mindful of privilege. That's all.

24 Q. If we can get rid of that pullout and go down
25 in the bottom half of the same page of

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1 | **Exhibit x.**

So this is what you were talking about before -- that you get this email from Attorney Commissio, and he is basically giving you feedback on a preliminary version of your report to United Way; would that be a fair way to characterize that?

8 A. Correct.

9 Q. One of the things you're discussing here is
10 something "between a full deck and a thin
11 deck"; correct?

12 A. That's what Attorney Comisso is discussing,
13 yes.

14 Q. I mean, that's a fancy way of saying "more or
15 less information"?

16 A. Correct.

17 Q. I'd like to go to the second page of this
18 document. So if you can just magnify pretty
19 much everything there. Yeah.

20 So when he's giving you feedback, he's
21 going to specific pages on the document you
22 sent him; right?

23 A. Correct.

24 Q. So he's -- and at the top of this document,
25 which is X, he refers to page 32, first bullet,

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1 "delete reference to collusion among multiple
2 individuals. Change to 'Alrai executed a
3 complex fraud scheme which included gaining
4 trust and deceiving multiple individuals.'"

5 That was something that Attorney Commissio
6 told you to change; right?

7 A. Correct. Yes.

8 Q. And you did change it; right?

9 A. Yes.

10 Q. You used the exact language that he told you to
11 use?

12 A. This is an instance where the word "collusion"
13 could be confused in terms of -- internal
14 collusion, I think, was his point. So I made
15 the changes. I thought it was misleading.

16 Q. But he added more of -- making it sound like
17 this is all Mr. Alrai who executed this complex
18 fraud scheme.

19 That was language he told you to use as
20 well; correct?

21 A. I don't know what the specific changes were
22 here. I think the concern was the word
23 "collusion." I'd have to look to see what
24 changed between versions. But the indication
25 here is that there was no known collusion or

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1 evidence of collusion by United Way employees;
2 right? So by using that word, it would be
3 confusing to the reader of this report, so it
4 should be clear.

5 Q. And so you made the changes that
6 Attorney Commisso told you to make; correct?

7 A. Yes, we made that change.

8 Q. And then you submitted the report with the
9 changes that were made; correct?

10 A. Correct.

11 Q. Now, this email here that we've just gone
12 through -- that was an email that was not
13 shared with either the Government or the
14 Defendant prior to trial; correct?

15 A. As part of our discovery, this is part of our
16 efforts to turn over every -- any and all
17 documents and communications that may be
18 relevant, beyond what may have specifically
19 been responsive to what had been requested
20 before.

21 Q. And this was not turned over prior to trial?

22 A. I'm not aware that it was.

23 MS. BROWN: Tracy, can you pull up
24 Exhibit D?

25 (Pre-marked Defendant's Exhibit D

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1 introduced.)

2 MS. BROWN: And if you can go to the last
3 page on that, we'll sort of work our way
4 forward with the email exchange here. Okay.

5 Q. (By Ms. Brown) So this email starts out with
6 an email from Attorney Hunter of the U.S.
7 Attorney's Office.

8 And it is to "Tim." And as you'll see
9 from the next page, it's Attorney Harrington,
0 who was previous defense counsel.

1 And it says, "Please see the attached
2 letters regarding the Alrai case. I've also
3 attached a supplemental production consisting
4 of Bates numbers" -- I'm not going to read
5 those out.

6 So this is not an email initially
7 involving you, but at some point it was
8 forwarded to you; correct?

A. Well, you'd have to show me, but, yeah.

20 Q. Okay. Well, let's go back to the page before
21 this. So then the exchange here is an email
22 from Attorney Harrington.

23 It says, "Matthew, thank you for the
24 information. In regard to Mr. Naviloff,
25 although I appreciate the summary, has he

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1 prepared a report of his filings either for you
2 or the United Way?"

3 And that is signed, "Best regards, Timothy
4 M. Harrington"; correct?

5 A. Correct. Yes.

6 Q. And let's go a page before that. So then
7 Attorney Hunter forwards -- then he has an
8 exchange with Attorney Harrington about -- the
9 Government had recently retained you, and that
10 you had not prepared a report. And he expects
11 that you will and that they will deliver it
12 promptly.

13 So there's another email -- we're going to
14 go back a page -- from Attorney Harrington. So
15 go back to the page before this -- the one with
16 all the outline.

17 So then there's a request that's addressed
18 to John and Matt of the U.S. Attorney's Office
19 from the defense attorney, saying, "After
20 reviewing the summary of Naviloff's expected
21 testimony, I'm requesting the following: All
22 reports prepared by Greg Naviloff of RSM and
23 its employees, hereinafter collectively
24 referred to as 'RSM for the United Way'" --

25 THE COURT: Donna, you've got to take it

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1 easy on the reporter when you're reading stuff
2 like this.

3 MS. BROWN: Okay. Sorry about that.

4 THE COURT: We can see the document. We
5 can read it. Maybe just refer to the item
6 numbers.

7 Q. (By Ms. Brown) Okay. Yeah.

8 I'll refer to item number one of what
9 we're looking at now, which is D. I think it's
10 page three. It asks for all reports from RSM
11 regarding this case.

12 Did you turn over all reports from RSM
13 regarding this case?

14 A. Which letter are you on? Sorry.

15 Q. Well, A1?

16 A. A1. Got you.

17 Yes, so all that I was aware of, yes.

18 Q. So A2 says "copy of documents and other data
19 collected and reviewed by RSM in calculating
20 United Way's loss."

21 Did you provide those documents in
22 discovery?

23 A. We would have made available the documents for
24 review, yes -- a copy of all documents
25 collected and that served as the basis for our

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1 calculation.

2 Q. Well, it doesn't say that served as the basis
3 for your calculation.

4 It says "reviewed."

5 A. We wouldn't have turned over everything. I
6 mean, there's GLs and all sorts of information
7 that was collected as part of this that goes to
8 the heart of United Way's operations. What was
9 utilized for the basis of our loss calculation
10 would have been made available.

11 Q. The 600 emails that were produced after trial
12 were not made available; correct?

13 A. Yeah. As far as the emails, we opted for a
14 conservative approach, right, and made
15 available all these emails, even though, in my
16 opinion, there's -- only a little number of
17 these are responsive to the Court's order that
18 took place. So this was our attempt to
19 comply with --

20 THE COURT: No, she's asking you about
21 pretrial.

22 Q. (By Ms. Brown) Yes.

23 A. Not the 600 emails? Sorry, which --

24 Q. I'll rephrase my question.

25 So we were talking about A2 here regarding

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1 documents reviewed by RSM.

2 A. Yeah.

3 Q. What my question was, is that the 600 emails
4 that we received after trial -- you didn't
5 produce them before trial, consistent with this
6 request in number two?

7 A. Yes. Consistent with what I stated there, we
8 shared everything that was relevant to the
9 calculation and the making of the calculation,
10 as well as a discussion with counsel, right, of
11 available information that was necessary.

12 Q. Well, I think you're answering a different
13 question than I'm asking.

14 This particular sentence says "documents
15 reviewed," not "documents relied on" or not
16 "documents incorporated into." It says
17 "documents reviewed" --

18 A. Yep. There was discussions --

19 Q. -- you looked at and decided wasn't important.

20 That would be covered by this sentence;
21 right?

22 A. Yes. And these are items that were discussed
23 with the U.S. Attorney's Office. They were
24 made available, or at least known, that we had
25 general ledgers and all sorts of other

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1 documents that were collected that were part of
2 United Way's business records; right? That we
3 performed a lot of collections. And you can't
4 bifurcate what was collected for purposes of
5 loss analysis versus the five other reasons
6 they may have been collected; right?

7 Policies and procedures -- all sorts of
8 information that may have been part of that
9 response. So the U.S. Attorney's Office was
10 made aware and Commissio Law was made aware of
11 what we had collected or the vastness of what
12 had been collected.

13 THE COURT: So are you saying that the
14 U.S. Attorney's Office was made aware that
15 there were internal emails between you and
16 other RSM employees discussing these analyses?

17 THE WITNESS: Well, yes, they would have
18 been aware that emails take place, and that
19 there's emails discussing analyses, and they
20 were transient upon preparing our work product;
21 right -- my final loss calculation.

22 THE COURT: You say they "would have been
23 aware." I don't know what that means.

24 Were they made aware by you, or were they
25 not?

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1 THE WITNESS: I don't recall any direct
2 conversations about transient emails, per se,
3 that went to my team members in producing those
4 emails with respect to this.

5 THE COURT: So how would they have known
6 that? So you just said they would have known
7 that. I asked you how.

8 And you said, "Well, we didn't talk about
9 it." So how would they have known that?

10 THE WITNESS: Well, by the nature of my
11 work, I'm emailing my team every day.

12 THE COURT: How would they know that?

13 THE WITNESS: That's just a normal mode of
14 communication, I guess. I just assume they
15 would know that I was emailing my team.

16 THE COURT: That's sensible.

17 What's a "transient email," by the way?
18 Is that a special kind of email?

19 THE WITNESS: No. As part of the work
20 performed, there were emails that had mental
21 impressions or thoughts at certain points in
22 time. All the relevant information was taken
23 from those and put into my report.

24 THE COURT: Except information you didn't
25 deem worthy of being in your report. In other

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1 words, when you read something and you wanted
2 to rely on it, you put it in the report. But
3 things you chose not to rely on, you didn't
4 include in the report; right?

5 THE WITNESS: Yeah. And we discussed
6 generally whether we needed to do an email
7 review and turn over emails.

8 THE COURT: Who is "we"?

9 THE WITNESS: Commisso and, I believe, the
10 U.S. Attorney's Office as well. I can't
11 remember exact discussions.

12 THE COURT: And you?

13 THE WITNESS: Yeah.

14 THE COURT: Discussed turning over emails?

15 THE WITNESS: We discussed whether or not
16 this was overly broad to include privileged
17 emails that happened with Commisso Law with
18 respect to what's being shared.

19 THE COURT: Look, I don't mean to bear
20 down on you.

21 THE WITNESS: It's fine. I get it. I
22 understand.

23 THE COURT: I'm asking you whether you had
24 conversations -- I'm only using the U.S.
25 Attorney's Office and Mr. Commisso, because

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1 that's what you said. I don't want to put
2 words in your mouth because that's the last
3 thing I want to do.

4 THE WITNESS: No, that's fine.

5 THE COURT: But did you have conversations
6 with Attorney Comisso in the U.S. Attorney's
7 Office about the fact that you had internal
8 emails that you reviewed as part of your work?

9 THE WITNESS: Yes, I would have made it
10 known that there were emails that had
11 communications between me and my team that I
12 considered part of Comisso's discussions --
13 privileged. And that was made known.

14 THE COURT: And as you already explained,
15 that information you relied on would be
16 included in the reports; but information you
17 chose not to rely on would not be included?

18 THE WITNESS: That's correct, yes --
19 transient.

20 THE COURT: Well, is that what "transient"
21 means? I'm lost.

22 THE WITNESS: "Transient" just means
23 information's being shared in emails. The
24 information that is gleaned from the emails
25 that's relevant to my report is taken. But the

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1 emails don't serve as the record of my work;
2 right?

3 THE COURT: Well, I don't know.

4 THE WITNESS: The report --

5 THE COURT: In examining you as a witness,
6 I would want to know what you relied on, but I
7 would also want to know what you chose not to
8 rely on. That would be important to me as
9 someone examining you.

10 And I'm not suggesting, by the way, that
11 emails like this are necessarily turned over in
12 civil or criminal discovery. That's a
13 different conversation. But it matters to me
14 whether this was discussed with the prosecution
15 or Mr. Commisso.

16 And my understanding is your answer to
17 that is "yes."

18 THE WITNESS: Yes. For the record, yes.
19 I'm aware that there's emails in our possession
20 that were with Commisso that discussed these;
21 right? And these all contained, for the most
22 part, conversations with Attorney Commisso,
23 until we were engaged later on in 2019 by the
24 U.S. Attorney's Office. And this one appears
25 to be with the U.S. Attorney's Office. Yep.

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1 THE COURT: I'm sorry to interrupt.

2 MS. BROWN: Mr. Naviloff, your voice is
3 dropping a little bit.

4 THE WITNESS: My mic falls down, and I
5 apologize. I wish there was a way to control
6 the volume on my mic.

7 Q. (By Ms. Brown) I really do not want to belabor
8 this, but I just want to follow up quickly on
9 the Judge's point.

10 You agree with me that relying on
11 something is different than reviewing
12 something; right?

13 A. Relying and reviewing, yes, are different.

14 Q. And you agree with me that at least what the
15 defense attorney was asking for here -- and I'm
16 not going to get into whether he got it or not.

17 He was asking for documents reviewed, not
18 just documents relied on. You knew that;
19 right?

20 A. That's correct. That was part of the
21 discussion with the U.S. Attorney's Office and
22 with Commisso Law.

23 Q. And so you knew that's what the attorney was
24 getting at -- was getting at documents
25 reviewed, not just relied on?

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1 A. Yes.

2 Q. And you talked about -- there were discussions
3 about whether turning over the emails, but
4 before that you talked about, well, there's
5 really super confidential things about business
6 records.

7 That's separate than emails regarding your
8 opinions from trial; right? You know, if
9 there's some internal documents regarding
10 security, you can't lump that into the same
11 discovery request as emails sharing information
12 among experts.

13 A. Are we talking about A2 here? Or are we
14 speaking just generally to --

15 Q. Well, I think when I first asked you about A2,
16 you said, "Well, we can't just give them
17 everything, because that could involve internal
18 business records." But I'm not asking about
19 that right now.

20 I'm asking about these emails between your
21 team at RSM, either internal at RSM or between
22 Attorney Comisso. Those were documents that
23 weren't turned over too; right?

24 A. So A2 says "a copy of all documents and data
25 collected and reviewed," right, in calculating.

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1 So the documents and data collected --
2 that would be information from United Way;
3 right?

4 Q. Yes.

5 A. So the emails are part of my work and my team's
6 work. So with respect to this whole discussion
7 on emails, I don't know how it fits into A2
8 with respect to what my team and I are
9 discussing in terms of analyzing and preparing
10 a report that served as the final record on my
11 opinion.

12 THE COURT: What I want to know is, if it
13 didn't have anything to do with this, why were
14 you talking about it to the U.S. Attorney and
15 Mr. Commisso?

16 THE WITNESS: Just generally speaking,
17 whether or not the emails were part of what
18 should be shared; right? We wanted to be
19 overly broad throughout this process. We had
20 discussed just generally what we should be
21 responding. We understood that generally,
22 emails are off-limits. And my understanding
23 was that was in agreement; right -- that what
24 was in our emails, like I said, is not -- it
25 was just transient in terms of a discussion

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1 that I may have had with my team or a question
2 I may have had with my team. It didn't
3 represent a final opinion on any matter.

4 THE COURT: All right.

5 Q. (By Ms. Brown) You agree with me that an email
6 is a document; right?

7 A. An email is a document.

8 Q. If I made a request for documents, emails would
9 be included in that definition of documents?

10 A. Yeah.

11 This says "collected and reviewed"; right?
12 So it wasn't something that I collected --
13 those emails. Those were conversations
14 internally, the way I read this.

15 But I'm happy to -- I get the larger
16 context here with respect to the emails and
17 issues. And as far as RSM is concerned, we
18 went above and beyond to produce everything
19 that we could produce in terms of emails, even
20 beyond what may have been part of the Judge's
21 order.

22 THE COURT: Yeah, but understand
23 something, Mr. Naviloff. This is a hearing
24 about pretrial.

25 THE WITNESS: Yes.

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1 THE COURT: And I think -- did you just
2 say -- maybe I misheard you. I thought you
3 just said you thought there was an agreement
4 that emails were off-limits.

5 THE WITNESS: I said my understanding is
6 that, from emails we weren't producing, that
7 RSM was not producing them in terms of -- this
8 wasn't an area that was responsive to A2.

9 THE COURT: That's fair. Okay.

10 THE WITNESS: That's all. That's it. I
11 didn't think it was responsive to A2.

12 THE COURT: What was the basis for that
13 understanding that RSM would not produce
14 emails?

15 THE WITNESS: Just a general discussion in
16 terms of "what is meant here? Is this intended
17 to be an overly broad" -- just this discussion
18 we're having here; right?

19 Is this really intended to be some really
20 tight discussion, or something overly broad?
21 My fuzzy recollection is this probably came up
22 for discussion with you, Judge Laplante.

23 THE COURT: I think you're probably right.

24 THE WITNESS: This came to a head
25 somewhere in this process. And I don't recall

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1 what happened, but as part of this process,
2 there were directions that were given to RSM
3 that we followed.

4 THE COURT: Okay. So you just said,
5 though -- I asked what the basis for your
6 understanding was that emails would not be
7 produced in response to this, which I
8 understand.

9 THE WITNESS: Yeah.

10 THE COURT: I don't even think that's an
11 unreasonable interpretation at all, by the way.
12 But you said it was based on general
13 discussions.

14 General discussions between who?

15 THE WITNESS: With the U.S. Attorney's
16 Office. And I'm -- presumably, Commisso was a
17 part of those discussions, because he was in
18 most discussions that we had with the U.S.
19 Attorney's Office, just generally speaking.

20 THE COURT: Thank you.

21 Q. (By Ms. Brown) So if I use this word
22 "transient" a lot -- and as I understood your
23 use of it, it explained a sort of work in
24 progress as to your opinions, findings, and
25 analysis in this case.

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1 Would that be a fair characterization of
2 that?

3 A. Correct. Yes.

4 Q. So the next paragraph would be A3.

5 Attorney Harrington asks for an explanation of
6 the methodology used by RSM in calculating
7 United Way's loss.

8 So I understand that, looking at the
9 methodology, you didn't feel that these emails
10 that we've just looked at already that talk
11 about the calculations and collecting the data
12 -- you did not feel that was responsive to
13 number three?

14 A. It looks like A3, to me, says, "Please write an
15 explanation of the methodology used by RSM to
16 calculate its loss." And this is July of 2019.

17 The reports that were made available would
18 have had the calculations with prior losses.
19 But I don't recall us writing down, at this
20 point in time, what my revised opinion or
21 report would be, given that I was just
22 retained.

23 Q. So let's go down to 4 -- I think it's F --
24 small F.

25 And one of the other requests is "witness

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1 interviews"; do you remember that?

2 A. Correct. Yes.

3 Q. And my understanding is RSM's response to that
4 is "we don't write stuff down" kind of thing?

5 A. If notes are taken, they were typically on
6 notepads for which relevant information made
7 their way into those fact-finding reports that
8 we had issued or shared -- or information that
9 we had shared with counsel.

10 But there was no formal memos -- or at
11 least my understanding from the team was that
12 they weren't asked to, nor did they keep, memos
13 in our record of retention, which is our shared
14 folder.

15 MS. BROWN: Now I'm going to move to
16 Exhibit E. And this is -- I'm going to go to
17 the last page of Exhibit E, which is also -- I
18 have as document 164-12. There we go.

19 (Pre-marked Defendant's Exhibit E
20 introduced.)

21 Q. (By Ms. Brown) So this is an email that I
22 believe you sent out. And it's kind of hard to
23 see because of the -- I think these are
24 hyperlinks here to other files, so they're not
25 in the same -- but you send, and I've counted,

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1 15 files to Attorney Commisso. And if we can
2 pull up that section on the top half there to
3 look at the files that you sent to
4 Attorney Commisso on Exhibit E so we -- we
5 can't see the dates very well, but we can see
6 the titles.

7 And four of these files have check marks
8 on them; correct?

9 A. Correct.

10 Q. And the four that have check marks -- one's
11 called "accounting exports;" right?

12 A. Correct.

13 Q. One is called "financial statements."

14 A. Correct.

15 Q. One is called "policies and procedures."

16 A. Correct.

17 Q. And one is called "bank statements."

18 A. Correct.

19 Q. At the bottom here of those 15 documents,
20 they're labeled "redacted data security."

21 And under "redacted data security," one
22 says "office phone invoices."

23 A. Correct.

24 Q. So did you make a determination that phone
25 invoices were protected by data security?

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1 A. If I'm interpreting this, I'm going to
2 interpret that there was something under
3 "redacted" -- the security -- some description
4 under folder 11 that's been removed --

5 Q. Oh. Okay.

6 A. -- by counsel. That's my guess.

7 Q. I understand.

8 So it's not that everything below that is
9 redacted under data security; it's that there's
10 a -- file 11 is --

11 A. Yes. That would be my best guess.

12 Q. And then there was a separate file where you
13 kept things involving the insurance claim?

14 A. Correct.

15 MS. BROWN: So, Tracy, if we can go back
16 to the previous page on this.

17 Q. (By Ms. Brown) And you are addressing an email
18 to John after you're sending these attached
19 links to these files.

20 "Let's discuss contents of these four
21 folders for potentially providing to the U.S.
22 Attorney's Office." And we're assuming, from
23 what we just discussed, the four that had the
24 check marks on them; correct?

25 A. That would be my best guess, yes. My

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1 recollection -- best recollection, I should
2 say.

3 Q. Now, one of the questions I have about this
4 email that hasn't been clear to me --

5 A. Yes.

6 Q. -- is do you have your own access to some of
7 these files? Or do you have to, like -- do you
8 have to go through Attorney Commisso to get
9 documents? Or do you have access to documents
10 all on your own? This seems to suggest that
11 you have access to documents on your own
12 without going through Attorney Commisso.

13 A. That's correct. So these are broad-based
14 categories -- those folders -- of types of
15 documents that my team collected and then put
16 into categorical folders during the work that
17 was performed -- the investigational work. So
18 those would have been collected by us. And
19 those folders would be appearing on our kind of
20 system of record -- our shared server file.

21 Q. And this may sound like a dumb question, but it
22 seems that if you're able to send them to
23 Attorney Commisso, that you had access to all
24 of those files listed there; right?

25 A. Yes.

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1 Q. And would you agree with me that all of those
2 files that are listed in this email, Exhibit E,
3 were not provided to the Defense; correct?

4 A. Can you share the next screen or the --

5 Q. Page two again?

6 A. Yeah, thank you. Sorry.

7 Q. That's okay.

8 And do you want to pull it out just so you
9 can see what's --

10 A. A little bit bigger, yeah. That would be
11 great.

12 So the question is whether the four check
13 boxes were shared, or whether --

14 Q. So we're seeing -- of these files we see here,
15 was everything shared with the Defense?

16 A. I'm guessing no, but I don't recall all the
17 details; right? So what I do know is we went
18 through the folders, and some of these -- many
19 of these inside vendor phone invoices -- that
20 stuff was all shared.

21 So anything that was relevant to our
22 calculation was shared. There were some of
23 these folders -- and I think there was the four
24 here -- that related more broadly to financial
25 statement information or accounting ledger

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1 detailed activity, or detailed policies and
2 procedures that were either collected for us to
3 assess the internal controls or to perform
4 testing that was outside of the loss
5 calculation.

6 So those were brought into a discussion
7 with Attorney Comisso with respect to what
8 information could be shared in terms of
9 discussions then with the U.S. Attorney's
10 Office, which I assume proceeded next in terms
11 of what we had in terms that was relevant to
12 the loss calculation.

13 Q. And one of the advantages of you being in
14 control of what gets sent to the U.S.
15 Attorney's is you know what you might be facing
16 for cross-examination; correct?

17 A. We looked at this as many work streams.
18 Anything related to the loss calculation that
19 was in these files was shared out of an
20 abundance of caution. There was no discretion
21 here.

22 It was really -- the discretion leaned on,
23 "Should we share stuff that had absolutely
24 nothing to do with the loss calculation that
25 may have been collected?"

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1 MS. BROWN: Can we pull up Exhibit Y?
2 And can we go to page -- is there a page
3 three? Go back a bit. Okay.

4 (Pre-marked Defendant's Exhibit Y
5 introduced.)

6 Q. (By Ms. Brown) So this starts off -- there's
7 an email from Ryan that he'll, quote, "Draw
8 something up, but on a high level. It's really
9 just initial follow-up on opening document
10 requests." So go back a page on this in terms
11 of to the end of the document. Okay. Well,
12 this starts out from Chris to Ryan and Ron.

13 "Do you have any issue with doing
14 John Meyer's meeting on Wednesday by phone? It
15 could be Webex." And then the discussion
16 ensues regarding that. So let's go back to
17 page three of that document. And it appears
18 some sort of document is sent to Ryan, and he
19 says he's going to draw something up.

20 Do you remember what that was about?

21 A. "I'll draw something up. Meeting to discuss IT
22 questions." I think they were discussing --
23 I'm not on this, but they may have circulated a
24 list with respect to some question, maybe. I'm
25 just guessing.

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1 "I'll draw up something."

2 Q. If we go up to the email after that, which
3 appears to be from Chris Fitzgerald, he thanks
4 Ryan for the work he's done on this particular
5 project.

6 And then there's a note addressed to Ron,
7 and it says, "Ryan analyzed the one instance we
8 currently have where we have an Insight invoice
9 and a DigitalNet invoice for the same period.
10 We currently have two Insight invoices, a topic
11 for discussion."

12 So at least according to Chris,
13 Ryan Gilpin did analysis on this case; right?

14 A. So, yeah, Ryan's -- I'm happy to fill in the
15 details there, at least what I know of the
16 process here.

17 Ryan was receiving and inventorying the
18 invoices for DigitalNet, and putting them into
19 spreadsheets, and taking the line item detail
20 from the DigitalNet invoices and putting them
21 categorically into the types of goods -- the
22 services and the equipment for purposes of us
23 quantifying the analysis -- the loss
24 calculation.

25 So he did some of the initial input. That

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1 information was then reviewed by others on the
2 team, including myself as part of my quality
3 control, and served as part of the fundamental
4 quantification of the various amounts that were
5 charged by DigitalNet.

6 So this is early on in the process -- July
7 of 2018 -- and he was collecting DigitalNet
8 invoices. And he had identified DigitalNet
9 invoices and was quantifying amounts --
10 itemized amounts on those invoices.

11 Q. And this was for calculating potential loss
12 regarding duplicative billing; is that what the
13 purpose of doing that analysis was?

14 A. Let's see. Currently, Insight and -- same
15 period. So I would presume, if this is
16 Insight -- I'm just thinking. Bear with me.

17 Yeah, so my recollection was Insight was
18 billing United Way directly. And then we saw
19 DigitalNet also billing United Way. So -- for
20 the same infrastructure-related services. So
21 that's the -- under the managed IT agreement.

22 Q. And so what we were just talking about -- that,
23 you would agree, would involve some at least
24 basic -- or some knowledge of IT services.

25 Because if you're looking at two documents

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1 and saying that they're delivering the same
2 thing, you would need to know about what
3 they're allegedly delivering; right?

4 A. Yes, there's some basic level of understanding
5 of IT services. None of this was complex. It
6 came down to some acronyms and some jargon
7 being included, and some marketing literature
8 being included on some of the invoices. So
9 understanding what that jargon or marketing
10 literature meant in terms of aligning -- in
11 other instances, that we were verbatim. So
12 there was no real judgment.

13 But here's where Ryan was helping to show
14 us where there was either marketing terms or
15 jargon used in the invoices, and making sure it
16 went into the proper category of services that
17 was being delivered.

18 Q. And so you were relying on Ryan to interpret
19 the IT language and services to make this
20 analysis; correct?

21 A. He was doing a first pass, is the way I would
22 describe it.

23 Q. But he was doing a first pass as someone who
24 was a couple of years out of college; right?

25 A. Correct. This is a rather straightforward

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1 infrastructure hosting that we had --
2 agreement. You've got services being charged
3 under agreement.

4 Does the invoice agree with the contract
5 for which the services were being delivered;
6 right? Those kind of things that I would
7 expect any first- or second-year to be able to
8 perform.

9 Q. And that was the opinion that you gave at
10 trial; correct -- that these were
11 straightforward. You just had to compare
12 invoice to invoice, and anybody could do it;
13 right?

14 A. Well, there's obviously words that are being
15 used in these invoices that require further
16 research. And that was where some of the
17 background from both Diego as well as from Ryan
18 was useful.

19 But, yeah, overall, the analysis of
20 understanding the -- breaking down the invoices
21 from DigitalNet where there was detail -- I
22 mean, it was difficult in the fact that in many
23 of the line items on the DigitalNet invoices,
24 there wasn't sufficient detail. But where
25 there was sufficient detail categorizing them,

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1 particularly consistent with the hosting
2 services -- infrastructure hosting -- as well
3 as the desktop as a service -- those were two
4 core areas that were more straightforward.

5 Q. So my question was that -- this was an opinion
6 you gave at trial, which was this was very
7 straightforward. Maybe had to do a little
8 looking stuff up, but that this was
9 straightforward and you did not need IT
10 expertise to make this analysis.

11 That was your opinion at trial; correct?

12 A. If you share it with me, then -- I don't know
13 if I said those words directly or not, but...

14 Q. Okay. Did you say you didn't need IT expertise
15 at trial, or -- I mean, I'm trying to --

16 A. No, I shared with you my -- what I testified to
17 here today; right -- is that Ryan assisted
18 looking at DigitalNet invoices, summarizing
19 them, and categorizing them for further review
20 by myself and my team.

21 Q. And you're saying that his two or three years'
22 experience was sufficient to make the technical
23 analysis that was necessary?

24 MR. DAVIS: Objection. Asked and
25 answered. Waste of time.

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1 THE CLERK: You're on mute, Judge.
2 THE COURT: I'm sorry about that.
3 I'm going to overrule the objection, but
4 he is correct. We are rehashing here, so let's
5 not do that.

6 Q. (By Ms. Brown) Okay.

7 On Ryan Gilpin, as I understood your
8 answer, you were saying that you thought the
9 experience level that he had was sufficient to
10 the task that you had given him to make the
11 analysis of these invoices for duplicative
12 billing; does that summarize it?

13 A. Yes, that's correct. And as part of this
14 analysis, we also looked at the other ad hoc
15 stuff that wasn't being included or bucketized
16 with respect to these same services. So some
17 of the initial hardware setup. So looking at
18 the totality of the services being provided,
19 and carving out the reoccurring charges; right?

20 So it was an effort to create an
21 apples-to-apples comparison of where those
22 reoccurring charges existed for which they were
23 significantly inflated, as I reported in my
24 expert testimony.

25 Q. And you've sat in at trial for the testimony of

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1 the defense expert, Jason Sgro; correct?

2 A. Yes.

3 Q. And you knew he disagreed with that opinion?

4 A. He did, yes.

5 Q. He disagreed that you could make the findings
6 that you made based on your experience and the
7 data that you had available to you; that was
8 his opinion?

9 A. That's generally my recollection, yes. His
10 view was that it's hard to make
11 apples-to-apples here. And for the reasons
12 that I described earlier; right -- that there's
13 initial setup costs and other costs that come
14 into play here -- and I think he viewed that as
15 being too difficult of an exercise, perhaps,
16 for purposes of doing this analysis.

17 Q. Now, one of the other areas that was asked for
18 by the Defense was information regarding market
19 data. That was in that email that we talked
20 about before.

21 Do you remember that -- that there was a
22 request for market data?

23 A. I don't recall, sorry.

24 MS. BROWN: Well, actually if we could
25 pull up --

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1 THE COURT: Is there any dispute that he
2 requested market data? It's not disputed;
3 right? We don't need to pull up the doc to do
4 that.

5 MS. BROWN: Okay. Great. I thought it
6 was in there. So I want to talk about that.

7 And if I could pull up Exhibit Z, which is
8 that RSM report, again. We're going to page
9 six of the RSM report of Exhibit Z.

10 Q. (By Ms. Brown) So this slide that -- for the
11 internal use for United Way talks about loss
12 quantification.

13 That's the title up on the bar; correct?

14 A. Correct. Yes.

15 Q. And so there's four bullets here. And I'm only
16 going to ask you about one, and that's the last
17 one.

18 And it says "Analysis of market data."

19 And you, in this presentation to the
20 United Way, said, "We identified IT vendors,
21 including national third-party application
22 development firm Andar and TBS Networks, to
23 establish" -- "to comparative quote amounts for
24 services reportedly delivered by DigitalNet to
25 United Way, and B, to order, to access, and

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1 quantify potential excessive billings."

2 So in your reporting back to United Way,
3 one of the things that you're looking at in
4 terms of potential issues is the analysis of
5 market data; correct?

6 A. This market analysis looks like it's particular
7 or pertaining to website development. Andar
8 and TBS Network weighed in on a website
9 development cost, I believe.

10 Q. And did you say that you remember that there
11 was a discovery request? And I'll just say
12 it's at Aa, on October 11, where
13 Attorney Harrington specifically asked for
14 market data.

15 Do you not recall that now, or...

16 A. Yeah, I believe you. I have no reason to doubt
17 that.

18 Q. In fact, he specifically referenced Andar and
19 TBS, which would tend to suggest that maybe he
20 was getting it right off of this very document;
21 right?

22 MR. DAVIS: Objection. Calls for
23 speculation.

24 THE COURT: No, it doesn't.

25 Q. (By Ms. Brown) But he did ask for -- he

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1 specifically referenced --

2 THE COURT: Hold on. Let me say this.

3 I overruled the objection, but I think I

4 do understand the sense of the objection, which

5 is that this is almost like a deposition now;

6 okay? And I realize that you've got a burden

7 here, but, I mean, it isn't really about --

8 there's no discovery order violation or rule

9 violation. Unless this market data-allotted

10 question you're going to leads to something

11 exculpatory, there's no reason to inquire about

12 it. Because the issue isn't that the discovery

13 requests were not complied with. The issue is

14 whether exculpatory evidence was not provided.

15 So connecting up to requests doesn't

16 really get us anywhere here. Unless -- and

17 maybe you are -- unless you're going to

18 something exculpatory.

19 MS. BROWN: Yes, Your Honor. And that's

20 where I'm going. So of the posttrial

21 discovery, this witness made representations

22 about market data not being relevant and not

23 turning it over.

24 THE COURT: Okay.

25 MS. BROWN: So I know this is somewhat

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1 laborious, but in order for that to make any
2 sense, I needed to go through the fact that it
3 was part of his calculation. There was a
4 request for it. And then the fact that he
5 chose not to turn over that information, I
6 think, is relevant.

7 THE COURT: Not unless it's exculpatory.
8 Because the issue isn't whether they complied,
9 again, with a discovery request or discovery
10 order. The issue isn't really the prosecutors
11 here were on notice of exculpatory information,
12 or whether it should have been provided to them
13 both, right, but whether there's exculpatory
14 information that was not provided pursuant to
15 their constitutional obligation.

16 So I don't think you have to lay this
17 ten-question foundation. I think you can raise
18 the evidence, establish for me whether it's
19 exculpatory or not in the best way you can, and
20 then you can tag it back to whether -- to show
21 me how either the prosecution knew about it or
22 should have known about it.

23 But we're spending a lot of time here.
24 And you're trying to lay it out, but I'm not
25 sure it's necessary. And you've got a fairly

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1 -- I don't want to call the witness
2 "uncooperative," but he's an adverse witness.
3 So as you go through it, it's laborious,
4 because he doesn't want to be led in a
5 direction he doesn't want to go, like any
6 witness.

7 So I would suggest you point to me the
8 exculpatory evidence. And if I think you need
9 to -- if I have questions about whether it
10 should have been provided for some reason, I'll
11 ask. But, I mean, a perfect example is those
12 emails; right?

13 Those types of emails, internally by an
14 expert, wouldn't normally be shared in civil
15 discovery. That normally would not happen,
16 unless there was a request for it and it was
17 sort of worked out; right? However, if the
18 prosecution is aware of it and either didn't
19 get it, or got it and didn't review it, or
20 reviewed it and didn't turn it over, well,
21 that's a different analysis.

22 It's not about whether market data was
23 necessarily requested. It's about whether
24 exculpatory market data information was not
25 provided.

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1 MS. BROWN: Well, just briefly -- I know
2 we're coming up to 12:30, Your Honor.

3 One of the cases that we are looking
4 towards in this case is the Bundy case that's
5 cited in our pleadings. And the Court -- and
6 so one of the issues in Bundy was whether he
7 could get a new trial or it should be
8 dismissed. And the Court spent a lot of time
9 talking about the fact that these items not
10 only were requested, and specifically
11 requested, and specifically requested for a
12 reason, but that then that puts the Government
13 on notice.

14 Like, "Oh, that's their defense. That's
15 where they're going. They're going with that
16 defense, so if we find anything that goes along
17 with that, as opposed to not supporting
18 that..."

19 So the fact that the Government was put on
20 notice about "here's what the defense was."
21 The Defendant's expert was repeatedly trying to
22 get to the basis of these opinions because he
23 thought that they were problematic and they
24 didn't have a sufficient basis.

25 And that's the other -- this goes back to

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1 before -- why we decided not to call
2 Attorney Comisso first. Because this is -- we
3 need to set this foundation.

4 But the -- most important goes to our
5 expert, who is going to explain, like, "Hey,
6 this would have helped me explain what I was
7 trying to explain, which is" --

8 THE COURT: So what evidence are you
9 talking about? Just tell me.

10 MS. BROWN: Okay.

11 Well, one of the things is they're talking
12 about market data here, and making these
13 comparisons with Andar and other things. And
14 so I want to establish that, especially the
15 previous email regarding having Ryan look at
16 comparing the invoices -- those are really
17 important to our expert, because it shows that
18 he can see how they made the mistakes.

19 Like, he knew at trial that these opinions
20 were not correct. And so now that he can see
21 these emails, he can see why. He can see that
22 this young associate --

23 THE COURT: So what evidence are we
24 talking about? What exhibits? What evidence?

25 MS. BROWN: Well, for example, like we

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1 were just talking about a few minutes ago about
2 looking at invoices and looking at terms, and
3 matching up the terms and saying, "Well, this
4 has the same terms, and this has the same
5 terms. So, therefore, it must be duplicative."

6 Or saying, "DigitalNet provided this, and
7 something else provided that, so then it's
8 duplicative." But DigitalNet may have added
9 value to the same thing that's not showing up.

10 THE COURT: Sure. But you're not hearing
11 me, I guess. We're talking past each other.

12 What have you been given in the posttrial
13 discovery that should have been produced? What
14 are you actually talking about? That's all I'm
15 asking.

16 MS. BROWN: Okay. So these emails show
17 that --

18 THE COURT: So it's in the emails?

19 MS. BROWN: It is in the emails, yes.

20 THE COURT: The point isn't that the raw
21 data wasn't provided; the point is that it was
22 a point of discussion in the emails?

23 MS. BROWN: Right. And the emails show
24 errors in their analysis that our expert can
25 now point to that he couldn't do before trial.

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1 THE COURT: That's what I wanted to know.
2 Thank you.

3 I don't know how much time you really need
4 to spend laying foundation. I think the better
5 way to do this -- and that's why you're drawing
6 these objections, is it's just taking a long
7 time -- is maybe just make an offer of proof
8 that --

9 "Look, this was requested and not
10 produced. It was requested by this exhibit and
11 not produced." And if Mr. Davis disagrees,
12 he'll dispute it and you can develop it with
13 the witness. But I think a lot of time you're
14 spending is laborious because the witness is an
15 adverse witness who -- I don't want to call it
16 pulling teeth, but it's slow going. And he's
17 doing his best. He's doing his best, but
18 there's a -- you know, it's an adverse witness.

19 So I would suggest after lunch, when you
20 want a big lead-up before you land the blow,
21 just make an offer of proof about, like, the
22 travel of the case; right? There was this
23 letter. And it was requested, and there was
24 discussion, and we have the exhibit.

25 That's what I would suggest. I'm going to

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1 let you do it as you want, by the way, but it's
2 just a suggestion because we are -- we've spent
3 half a day now, and we're partway through the
4 direct of one witness. And it's -- I mean, the
5 case took how long to try? It took -- I don't
6 remember.

7 What did it take? Anybody remember?
8 Seven days, Kim? Yeah. Anyways, thanks. I
9 will see you at 1:30.

10 (Recess taken at 12:32 p.m., and the
11 proceedings resumed at 1:42 p.m.)

12 THE COURT: Okay. Ready to resume.

13 Anybody have anything we need to raise
14 before we continue?

15 MS. BROWN: Not from the Defense, Your
16 Honor.

17 THE COURT: Attorney Brown, please
18 proceed.

19 MS. BROWN: And just by way of an offer of
20 proof, prior to the break we established that
21 in the report to United Way, RSM made reference
22 to market data that they had relied on, and
23 that the Defense had made a specific request
24 for market data and also for witness interviews
25 in that same July 2019 request, which we had

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1 talked about before. So I'll go to the next
2 step on that.

3 If we can pull up Exhibit Cc, Tracy.

4 (Pre-marked Defendant's Exhibit Cc
5 introduced.)

6 THE COURT: Mr. Davis, while we're pulling
7 that exhibit up, I probably don't need to say
8 this, but if you hear anything in an offer of
9 proof by defense counsel with which you don't
10 agree, please just make your objection known.

11 MR. DAVIS: Will do, Judge.

12 Q. (By Ms. Brown) And I'll find where --

13 Mr. Naviloff -- there you are.

14 So this document that we are looking at,
15 which is Exhibit Cc, is an email from
16 Ryan Gilpin to -- we'll refer to it as several
17 members of the team, including yourself,
18 Mr. Nahass, Diego Rosenfeld, Trikinowsky
19 (phonetic). And it speaks for itself, so I
20 won't read everybody's name on there.

21 So this is dated August 20, 2018. And a
22 couple things I want to ask you about on this
23 email -- and we'll pull out the first paragraph
24 first, just to kind of set what it's about.

25 And so this is from Ryan saying that he

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1 wanted to send out a recap after a call with --
2 I would pronounce that Riyal Banarg (phonetic)
3 -- from Andar "just to summarize what we
4 identified and what our next steps are with him
5 to tie up -- tie out support on the DigitalNet
6 web development cost." So that's sort of the
7 topic.

8 So part of this email is he's discussing a
9 conversation he had with someone from Andar;
10 correct?

11 A. Correct. Yes.

12 MS. BROWN: And just for the Court's
13 benefit, this is an email that was not produced
14 prior to trial, but was recently produced in
15 the -- we've heard reference to the 600-plus
16 emails. This was part of that.

17 So, Tracy, if we can go to the next
18 paragraph in the same email, Cc.

19 So Mr. Gilpin goes on to summarize his
20 conversation with Riyal Banarg, and it said
21 that he reviewed pages identified in
22 DigitalNet's \$200,000 web development invoice.

23 He estimated an approximate level of
24 effort of four hours per page "should they have
25 been developed individually and in a vacuum, so

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1 we can likely estimate a lower range of time
2 for subsequent pages developed after the
3 first." And then he provides an hourly rate.

4 So would it be fair to say that this email
5 is a summary of a witness interview?

6 A. It appears to be so, yes.

7 Q. And you knew that Attorney Harrington was
8 looking for summaries of witness interviews,
9 didn't you?

10 A. Yes.

11 MR. DAVIS: Objection. Relevance. Waste
12 of time.

13 Your Honor, the web development costs were
14 specifically excluded from Mr. Naviloff's loss
15 calculation, as I understand it. So this has
16 nothing to do with his loss calculation.

17 THE COURT: Well, is it -- okay. Yeah,
18 market data was excluded from the loss
19 calculation.

20 You're saying it has no relevance to his
21 loss calculation; right?

22 MR. DAVIS: I'm saying that the cost of
23 web development that Mr. Alrai billed for was
24 specifically excluded from Mr. Naviloff's loss
25 analysis.

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1 THE COURT: If that is true, Ms. Brown,
2 does that affect your desire to inquire?

3 MS. BROWN: Well, Your Honor, I think that
4 this is -- I do know that this witness -- and
5 I'll make this by an offer of our proof -- does
6 say that when he specifically asked for this
7 data, he says he believes it's not relevant to
8 his opinion.

9 We feel that it's relevant to the analysis
10 that they've done in this case and the
11 progression of their opinions. And,
12 specifically, it was represented to us that
13 they did not keep any sort of memorialization
14 of witness interviews. And this appears to be
15 that. So I don't intend to spend a lot of time
16 on this, but I think this is relevant that --

17 THE COURT: Let me try.

18 MS. BROWN: -- he was in charge of witness
19 interviews and memorialized them in email.

20 THE COURT: So it's -- but is it also --
21 and I want to make sure I understood you.

22 Is it also going to be your -- are you
23 proffering me your expert will also say that
24 the failure to account for this factor in the
25 loss calculation was in some way a flaw in

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1 Mr. Naviloff's analysis?

2 MS. BROWN: No, I do not believe our
3 expert is going to say that.

4 THE COURT: It just goes to this witness
5 interview thing?

6 MS. BROWN: I'm sorry, what?

7 THE COURT: It just goes to the witness
8 interview issue, the representation, and,
9 therefore, his credibility?

10 MS. BROWN: Exactly.

11 THE COURT: I'll allow it.

12 Q. (By Ms. Brown) So you would agree with me,
13 Mr. Naviloff, that this -- Ryan Gilpin
14 summarized a witness interview in this email;
15 correct?

16 A. Yes.

17 Q. And I won't go into the details of the next
18 paragraph, but if we can take down the pullout
19 and go to the next paragraph, he actually
20 interviewed another person and summarized that
21 interview as well; correct?

22 A. Yes.

23 Q. And when you were asked for documents regarding
24 market data, you said that it wasn't relevant
25 to your opinion; correct?

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1 A. I was not aware of this email at the time. If
2 I've identified a document that I thought was a
3 summary of the nature of the discussions, I
4 would have proffered it. I just wasn't aware
5 of this. And I don't know that when I asked my
6 team to pull interview notes that they were
7 aware of this interview at the time of the
8 request.

9 So this was one where this is not relevant
10 to what I testified on, which may conflate the
11 issue with my -- this document. But,
12 ultimately, when you look at this, this only
13 serves to increase the amount of loss that I
14 would have shown in my calculation had I
15 testified to this matter or this issue of these
16 different services that were provided.

17 Q. But just to clarify, you are copied on this
18 email; right?

19 A. I was. And, yeah, I have thousands upon
20 thousands of emails. And it's not always easy
21 to distinguish every single email; hence, why
22 we try to memorialize stuff within our shared
23 folders so that we can share them.

24 Q. If we can go on to Exhibit Y. And I'm trying
25 to find where the quote -- oh, it's the first

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1 | thing.

So the first full sentence after it says "Ryan" on the top -- can you pull that out, Tracy? Thank you. And this is an email by you to Ryan Gilpin.

6 It says, "You are central to the team.
7 Having you on-site when possible is advisable.
8 Thanks."

9 That is a statement you made about
10 Ryan Gilpin; correct?

11 A. Correct.

12 Q. And you would agree that he was central to your
13 team; correct?

14 A. Yes. He was one of several people that was in
15 the field doing work helping with fact-finding.

16 (Pre-marked Defendant's Exhibit Dd
17 introduced.)

18 Q. (By Ms. Brown) So I'd like to move to
19 Exhibit Dd, which is also document 164-15:3.

20 So this email, which I think is a couple
21 of pages long, sets forth a list of tasks for
22 different people on the team. And right on the
23 bottom of that page where I think it says --
24 where there's, like, a partial box. And if we
25 could pull out that section with the partial

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1 box. Yeah, that's it.

2 So this is a task for Ryan, which is to
3 follow up with John Meyer re: the \$154,080
4 category special projects hosting fee.

5 So that's a task that Ryan had -- to meet
6 with John Meyer or talk with John Meyer and get
7 that information?

8 A. That appears so, yes.

9 Q. And, again, you don't have any emails
10 summarizing any conversations that Ryan Gilpin
11 had with Mr. Meyer? Or you didn't produce any
12 in discovery; correct?

13 A. I'm not aware. If I found something in the
14 600-plus emails, I'm happy to see it.

15 Q. And on this particular email here, the one --
16 Dd -- Diego Rosenfeld is not on the circle of
17 people who are discussing these issues in terms
18 of the tasks; correct?

19 MR. DAVIS: Same objection. Relevance.
20 Waste of time. Special projects and hosting
21 fee are, again, specifically excluded from
22 Mr. Naviloff's expert report. Counsel is
23 cross-examining on points which have no bearing
24 on Mr. Naviloff's testimony. This is a waste
25 of time.

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1 MS. BROWN: Your Honor, the main point of
2 my cross-examination on this is the, to quote
3 Mr. Naviloff, "central role" that Mr. Gilpin
4 had in the collection of data, interviewing
5 witnesses, and analysis of IT data. And this
6 email shows that role, and the responsibilities
7 and tasks that were given to this person that
8 go to this witness' credibility. And that's
9 why we've chosen this particular email which is
10 cited in our motion.

11 THE COURT: But if it's data collection
12 and involvement on issues that didn't go to the
13 opinion, is it relevant?

14 MS. BROWN: I think that the fact that RSM
15 delegated to a very inexperienced and, we would
16 argue, unqualified associate to do the
17 investigation in this case, and collect data,
18 and analyze that data -- it's very relevant to
19 the opinions. And that was a central theme the
20 Defendant tried to establish at trial, but was
21 unsuccessful because he didn't have these types
22 of documents that show how central Ryan Gilpin
23 was to the opinions that were offered at trial.

24 THE COURT: But how could it be central to
25 the opinion if this wasn't included in the

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3 I can understand the bigger picture -- I
4 really do. But -- and also, well, yeah, I
5 mean, they're not central to that opinion.

6 That's the point. Unless you have an argument
7 that they should be, and it doesn't sound like
8 Mr. Sgro is going to say that.

9 So I've got to say, in the interest of
10 some type of efficient proceeding, I've got to
11 sustain. Let's stick with the offers of proof
12 and let's get right down into the documents. I
13 really don't think you'll get objections from
14 the prosecution in most situations.

15 Q. (By Ms. Brown) Mr. Naviloff, do you remember
16 at trial that you were asked about the fact
17 that you were not an IT expert?

18 A. Yes, I do. I'm sorry.

19 Q. Okay. I didn't want to interrupt you.

20 And that when you were asked about that,
21 you said that you had consulted with John Meyer
22 and Diego Rosenfeld: correct?

23 A. That's correct, yes.

24 Q. And you didn't mention Ryan Gilpin, did you, by
25 name?

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1 A. I'd have to go back to the transcripts. I know
2 I mentioned in my report that it included
3 others under his direction or other IT
4 professionals, so...

5 Q. And when you were asked about your lack of IT
6 experience, you stated that in speaking with
7 John Meyer and Diego Rosenfeld, you explained
8 that Diego Rosenfeld was a principal with over
9 20 years of experience in technology solutions;
10 do you remember that?

11 A. Yes. Correct.

12 MS. BROWN: Now I want to talk to you
13 about an email -- it's documented 164-1. It's
14 also exhibit Ff, if we could pull that up.
15 This one's really hard to see, so I have a copy
16 here that I'm going to look along with.

17 (Pre-marked Defendant's Exhibit Ff
18 introduced.)

19 Q. (By Ms. Brown) So this is an email from
20 Chris Fitzgerald to you. If we can pull up the
21 first sentence, we can get an idea of what this
22 email is about. So Mr. Fitzgerald was saying
23 it would take nine hours over the course of a
24 year to dip below 99.9 percent.

25 And it sounds like the two of you are

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1 talking about some sort of analysis of
2 financial information you have regarding this
3 case; correct?

4 A. Yeah, it looks like it's availability, right,
5 and a high availability for the backups.

6 Q. And I'm going to skip down to the third
7 paragraph of that first email there, right
8 before Chris Fitzgerald's name, and pull that
9 out.

10 And this email says that "on another note,
11 I think we need to have a substantive meeting
12 with Diego to get him in the loop. I'm a bit
13 worried now, now that we are communicating with
14 the U.S. Attorney's Office" -- or,
15 "communicating to the U.S. Attorney's Office
16 and relying solely on Ryan, who is only a
17 (newly promoted) senior associate. In the
18 event Diego needs to testify, we need to be
19 sure he agrees with what we are relaying to
20 counsel/USAO."

21 So the fact that Mr. Fitzgerald is saying
22 "we need to have a substantive meeting with
23 Diego to get him in the loop," one could infer
24 from that he's not in the loop; would that be a
25 fair inference?

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(Audio dropped.)

Q. (By Ms. Brown) Chris, part of your team, was a bit worried that now that you -- meaning you and RSM -- are communicating with USAO, that relying on Ryan, who is only a newly promoted senior associate -- that is something he stated to you; correct?

A. Yeah, that's here.

Q. I want to go to -- right after the second line, "USAO," is the word "relying."

That's a word your team member used as to
Ryan Gilpin -- you said the word "relying" on
him; right?

A. So this is a good question; right? So this email goes to the center of what we're preparing and who's going to present evidence with respect to the backup; right -- high-availability backup. Certainly, I can look at, and I saw, the report that inventoried what was backed up at a point in time.

I'm not an IT expert and wouldn't testify in this. For purposes of my loss calculation done earlier, there was a preponderance of evidence collected throughout the investigation which concluded other IT professionals.

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1 So when we're looking at the totality of
2 evidence when I was preparing my report,
3 John Meyer -- certainly, along with my team, I
4 had the utmost confidence, and continue to have
5 the utmost confidence, that they got the right
6 answer.

7 What the concern appears to be here -- and
8 this is Chris' concern -- is that we're going
9 to be asked to testify, or I would have been
10 asked to testify on something as technical as
11 what constitutes high availability. And you
12 can see us breaking down the numbers here. I
13 wouldn't know an industry -- whether it's
14 measured over a year, or two years, or how that
15 would work in terms of the standards as well as
16 testifying on this.

17 But from what I deduce from this whole
18 conversation is, Look, you've got a couple of
19 images. What's contractually obligated or
20 promised was to have real time parallel system.
21 So I'm not testifying on that. Chris knows I'm
22 not testifying on that. And he knows Ryan's
23 not testifying on that. That's not something
24 he's going to testify on. He's not a seasoned
25 testifying expert.

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1 So to the extent that the U.S. Attorney's
2 Office needs someone to testify, which,
3 ultimately, John Meyer has, then that would
4 have been a point of concern. And I think
5 that's -- I'm inferring from this whole
6 conversation that that was a concern.

7 Further, Diego and I had many
8 conversations in the hallway. He sits down the
9 hallway from me. And those conversations are
10 outside the purview of Chris. So with respect
11 to where Diego was or wasn't with respect to
12 some of these issues, I think he was a little
13 bit outside the loop as well.

14 Q. I've got a couple questions to follow up on all
15 that.

16 A. Sure.

17 Q. You said that you were lacking in certain areas
18 of expertise, and I'm not sure if I understood
19 what that was.

20 Was it solely as to the high-availability
21 backup, or to other areas of IT? I'm not sure
22 if I followed your answers.

23 A. Yeah. What constitutes high-availability
24 backup as an industry professional; right? I
25 mean, there's contractual terms that said

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1 99.99, but I don't know that that had a
2 one-year requirement. I don't know how that
3 was measured over what period of time.

4 So some of those special technical items
5 certainly aren't in an area that I would have
6 expertise in. Chris knows that. As far as --
7 I think there was an incident that immediately
8 followed the transition of the IT department,
9 where the organization did suffer downtime;
10 right? And it was essentially on the same
11 platform, is my understanding.

12 So all that stuff goes into areas that I
13 wouldn't testify on, because why did the system
14 go down? Whether or not that incident, which
15 appeared to result through the lack of services
16 that were promised, and how they contributed
17 with -- separate and apart from what I was
18 doing, which was an accounting analysis.

19 So Chris is right to have called out, from
20 an accounting analysis, this isn't what we're
21 -- or what I would testify on. That these are
22 areas that get technical into whether or not
23 the proper backups were occurring. I know we
24 saw the images, and I saw evidence that it
25 wasn't occurring. But with respect to the

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1 significance of all those events, and how they
2 would translate into confirmation that
3 high-availability backup didn't occur -- that's
4 certainly an area that the U.S. Attorney's
5 Office sought advice from John Meyer and
6 others.

7 Q. So is it your testimony that the gap that you
8 had in your expertise, which you admit has to
9 do on this particular area -- high-availability
10 backup -- that John Meyer filled that gap in
11 terms of a witness?

12 A. Yeah, I believe I put an assumption in the
13 report that -- there is an assumption that
14 high-availability didn't occur, with John Meyer
15 testifying to the fact. I'm pretty sure that's
16 how I phrased it in my report, or something to
17 that effect.

18 So to the extent that high-availability
19 backup did occur, which doesn't seem like it
20 did, according to either Ryan, to Diego, to
21 John Meyer, that would be news to me. But for
22 purposes of what I was being asked to testify
23 on as an accounting analysis, I was relying
24 upon their expertise with respect to what,
25 technically, is high availability, and was

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1 having two copied servers that appeared to have
2 been standalone and potentially not run in
3 parallel -- once again, outside of my expertise
4 whether or not that really satisfied the
5 obligation under -- contractually.

6 Q. I'm just trying to follow you.

7 Are you saying that the opinion that you
8 relied on regarding high-availability backup
9 came from John Meyer, or Diego Rosenfeld, or
10 both?

11 A. It's John Meyer, but it was -- his opinion was
12 consistent with my team's view; right? And
13 they weren't asked to offer an opinion to me or
14 to anyone. They did fact-finding. They shared
15 what they understood to be the evidence.
16 John Meyer had the same evidence, and
17 John Meyer testified, I believe.

18 Q. So if they already had evidence from John Meyer
19 on this issue, and you weren't qualified, why
20 would you need to bring Diego Rosenfeld into,
21 quote, "the loop"?

22 A. Bringing Diego into the loop is what may have
23 potentially -- this is predetermining who's
24 testifying on what, if anything. So I didn't
25 know whether or not we were going to do more

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1 work. And, potentially, Diego would have
2 offered an opinion of his own, separate and
3 apart from what I'm doing, whether Diego would
4 potentially deliver an opinion that was
5 supportive of John Meyer's opinion or separate
6 entirely from what I was doing.

7 Q. And just to emphasize the date on this, it's
8 November 28 of 2018, which is a significant
9 date in this case because that was the date
10 that Mr. Alrai was indicted; correct? Remember
11 we talked about that in some earlier emails?

12 A. Yeah, I believe so. I don't know the exact
13 date, but I know this is all happening around
14 the same time. And there's a discussion of who
15 would be testifying to what.

16 And I think that's part of what Chris is
17 getting at here -- is that I've done an
18 accounting analysis, and that the fundamental
19 math behind that analysis is solid. The cost
20 comparison is solid. What is absent is the
21 delivery. Was it delivered or not? So this
22 flips into simply whether it was delivered or
23 not to whether it was overbilled.

24 So, in my opinion, even if it it was
25 delivered, you fall back to my other

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1 calculation of \$3.7 million. There's no cost
2 to support the level of billing for these
3 services.

4 Q. So you will agree with me that this email shows
5 that at least one member of your team is
6 concerned about Ryan's lack of experience?

7 A. His specific concern is, he states here -- I
8 mean, you can read it for yourself. But my
9 understanding or what I infer from this is that
10 we have to potentially provide evidence to the
11 U.S. Attorney's Office, if asked. And that may
12 include testifying.

13 And the understanding is that if we need
14 to testify -- meaning people at RSM -- those
15 identities of those individuals not known --
16 then we would need more than just Ryan to
17 testify with respect to what was, at a minimum,
18 overbilling, but may extend to undelivered
19 services.

20 Q. But it doesn't say you need more than Ryan.

21 It says you need to bring Diego into the
22 loop instead of Ryan.

23 A. I don't want to mince words, but that would be
24 more; right -- bringing another person? And
25 this is also -- as I mentioned, this is

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1 Chris Fitzgerald's perspective, without
2 realizing that I -- I know he knows I sit down
3 the hallway from Diego. But the amount of
4 communications that I have with each member of
5 the team isn't necessarily known to other
6 members of the team; right?

7 Q. In any event, you didn't share this email with
8 either the Government or the Defendant prior to
9 the trial; correct?

10 A. I imagine this is one of the 600.

11 Q. It is?

12 A. Yeah, so I don't believe so.

13 MS. BROWN: Can we bring up Exhibit Gg,
14 which is also docket number -- document number
15 164-2? And if we could pull up the bottom
16 paragraph of that, "a couple of notes."

17 (Pre-marked Defendant's Exhibit Gg
18 introduced.)

19 Q. (By Ms. Brown) So in this email -- and maybe
20 it would be helpful if I gave a little bit of
21 background here. This is October 1, 2018. As
22 I recall, and feel free for you or even the
23 Government to correct me, you're putting
24 together the report for United Way -- the
25 slides that we saw earlier -- some version of

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them.

And in discussing finalizing that report with who you refer to as "John C.," and this is from Chris Fitzgerald, he says that a "trending of total United Way MB budget v. IT budget was not" and he uses the word "fruitful" -- "over the period analyzed. They each had a 7 percent cumulative increase, and generally trended together. We have therefore not included a slide to show this."

And you -- that email is actually directed to you and Ron Haas; correct?

A. Yes, it's directed to us.

Q. So the team at RSM decided that doing a slide about the budget comparisons either post, pre Mr. Alrai were not fruitful, and that was because they didn't show anything that tended to establish loss or fraud; right?

A. No, I don't know that the context -- I think "fruitful" -- I don't know what the term was intended to imply, other than you look at it -- number one, I think this was included in the report. And this is a report to the special committee.

And, number two, I think this was part of

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1 my testimony in court. So the fact that
2 United Way had an inflated IT budget before it
3 hired Imran, and then continued to be elevated
4 during Imran's tenure and go at a 7 percent
5 clip, was part of, I think, the factual
6 background of this case. I think he was -- I
7 just don't know what was meant by the term
8 "fruitful" other than -- I just -- I would only
9 be speculating.

10 Q. But a slide along the lines showing this was
11 not included in the presentation that you made
12 to United Way?

13 A. Is that true? I don't know.

14 Q. Well, I'm asking you.

15 A. I thought it was disclosed, yeah. The budget
16 and the trends, I thought was. I could be
17 wrong, but I thought it was.

18 Q. It's just that the way I'm reading this email,
19 it sounds like that Chris left out a slide on
20 this.

21 A. No, I think he was providing commentary. I
22 don't know that it says it was left out.

23 Q. Yeah, the last sentence it does.

24 A. Okay.

25 Yeah, I don't recall whether it ultimately

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1 was left out. I have some inclination that it
2 was included, but I don't know why. So,
3 apologies.

4 MS. BROWN: If I could just have a moment,
5 Your Honor. I'm looking through my notes and
6 there's questions I've already asked.

7 THE COURT: Thank you. Take your time.

8 MS. BROWN: Thank you. It always happens
9 when I get close to the end.

10 That is all of my questions. I had asked
11 all the other ones already.

12 THE COURT: Mr. Davis, it's your witness.

CROSS-EXAMINATION

15 BY MR. DAVIS:

16 Q. So, Mr. Naviloff, you did an alternate loss
17 calculation based on personal enrichment; is
18 that right?

19 A. Yes, that's correct.

20 Q. And what was the approximate amount of loss
21 calculated using that technique?

22 A. Approximately \$3.7 million.

23 Q. Have you been asked a single question in the
24 four hours you've been testifying about that
25 loss calculation?

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1 A. I don't believe I have.

2 Q. You were asked about Mr. Commissio as a
3 gatekeeper; do you recall those questions?

4 A. Yes, I do.

5 Q. Now, I want to ask you, what was Mr. Commissio a
6 gatekeeper of once you were engaged by the U.S.
7 Attorney's Office? Do you recall?

8 A. Well, anything to do with United Way's books
9 and records, particularly where they may not
10 have related to our loss calculation. And that
11 was a significant concern of his, right, that
12 that information would be provided. But aside
13 from that, nothing that the U.S. Attorney's
14 Office provided me was subject to his review,
15 or his inspection, or his analysis.

16 Q. So just to be clear, well before you were
17 engaged, United Way provided the United States
18 Attorney's Office with a huge collection of
19 data from United Way; are you familiar with
20 that?

21 A. That's correct, yes.

22 Q. And that was in response to grand jury
23 subpoena?

24 A. That was my understanding yes.

25 Q. And that included essentially every document

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1 about loss and your loss calculation that
2 Mr. Commisso identified; correct?

3 A. Yes, that included significant documentation
4 from DigitalNet and his other affiliated
5 businesses, and the costs and revenues -- or
6 monies received and monies spent associated
7 with those businesses.

8 Q. And, of course, Mr. Commisso waived United
9 Way's privilege regarding its internal
10 investigation about that loss calculation in
11 order to reveal all those documents; correct?

12 A. Yes. That's my understanding, yes.

13 Q. United Way was not asserting a privilege
14 regarding anything that it had regarding your
15 loss calculation; correct?

16 A. That's my understanding, yes.

17 Q. But after you were engaged in the summer of
18 2019, as trial neared, there were additional
19 discovery requests for United Way documents; is
20 that correct?

21 A. That's correct, yes.

22 Q. And in those additional discovery requests,
23 there were new documents identified that were
24 in United Way's possession; right?

25 A. "New documents in United Way's possession,"

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1 meaning...

2 Q. That is, documents that had not been turned
3 over initially.

4 There were at least some additional
5 documents?

6 A. Yes, there were additional documents --
7 additional requests and additional documents
8 that were provided.

9 Q. And there were also additional documents
10 provided by RSM from its engagement with
11 United Way; right?

12 A. Correct. Yes.

13 Q. All right.

14 And when a new discovery request came in
15 as trial neared in 2019, Mr. Commissio did serve
16 as gatekeeper to determine whether particular
17 new documents were privileged; is that right?

18 A. That's correct. There was a lot of comingling
19 of work streams and certainly some sensitivity,
20 particularly with identifying the relevance of
21 some of the documents.

22 Q. And in the case of new documents like that, one
23 of the things you did was communicate with
24 Mr. Commissio about whether there was a
25 privilege for specific documents; is that

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1 correct?

2 A. Correct.

3 MR. DAVIS: I'm sorry. I'm just trying to
4 shield my face from the sun's rays.

5 THE COURT: If you need to get up and
6 close that or whatever, feel free.

7 MR. DAVIS: Sorry, Judge.

8 THE COURT: No problem. That's about as
9 good as it gets.

10 Q. (By Mr. Davis) So, Mr. Naviloff, your personal
11 enrichment analysis depended on documents in
12 addition to United Way documents; is that fair
13 to say?

14 A. That's correct. Those are Mr. Alrai's business
15 records, primarily.

16 Q. Was one of the things that you needed to review
17 the records, actually, of DigitalNet, the
18 company we're talking about here?

19 A. Correct.

20 Q. And did the Government share with you numerous
21 documents that had been seized at Mr. Alrai's
22 home in New Hampshire from his home office that
23 purported to be DigitalNet records?

24 A. That's my understanding of the origin.

25 Q. And you reviewed those documents as part of

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1 your work and your engagement for the
2 Government; correct?

3 A. That is correct. Yes, I did.

4 Q. And United Way and Mr. Commisso didn't have
5 those documents right? That's not something
6 that was in their collection?

7 A. That is correct.

8 Q. And, in fact, one of United Way's great
9 challenges in this entire investigation is that
10 they don't have any DigitalNet documents; is
11 that fair to say?

12 A. That's correct.

13 Q. That is, other than the documents that
14 DigitalNet submitted to them like invoices,
15 they don't have what actually happened at
16 DigitalNet; correct?

17 A. They have -- they don't have, obviously,
18 DigitalNet's books and records. They don't
19 have their costing information. They don't
20 have cash receipts information -- those types
21 of records.

22 Q. And the only records, as far as you know, that
23 exists of those things are what Mr. Alrai had
24 himself at his house; right?

25 MS. BROWN: I have an objection. I may be

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1 missing something, but I don't know if the
2 Government's argument is that the -- the Brady
3 violation is excused because the Defendant
4 didn't turn over documents. I'm not following
5 why that he didn't produce documents is
6 relevant to them not producing documents.

7 THE COURT: He didn't -- when you say
8 "he"...

9 MS. BROWN: Mr. Alrai. That's what I'm
10 understanding this line of questions to be
11 about -- that there were documents that they
12 didn't get access to.

13 THE COURT: I don't want to speak for
14 Mr. Davis, but what I'm drawing from this, for
15 better or worse, is that, basically, you can't
16 show prejudice because a lot of this work done
17 by the expert was not based on the loss
18 calculation as to United Way, but as to unjust
19 enrichment as to your client. And, therefore,
20 any failure to produce any of these emails, et
21 cetera, is nonprejudicial.

22 Mr. Davis, have I got that right? You can
23 tell me -- if I got it wrong, you can disabuse
24 me.

25 MR. DAVIS: That's correct, Judge.

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1 THE COURT: So it's not that it excuses
2 it. It's that it renders it nonprejudicial.
3 That's the argument.

4 Let me ask you this, Mr. Davis. And this
5 is not an attack. It's just a question.

6 Did you brief this argument?

7 MR. DAVIS: Judge, Mr. Hunter briefed it.
8 I think he did, unless we were both in trial in
9 front of you that month.

10 THE COURT: It might have gone over me.

11 Mr. Hunter, did you brief this argument?

12 MR. HUNTER: Yes. I think it's both in
13 the -- I think definitely in our objection, and
14 I think I might have mentioned it in our
15 surreply.

16 THE COURT: Thank you, sir.

17 You may proceed, Mr. Davis. Objection
18 overruled.

19 MR. DAVIS: Thank you, Judge.

20 Q. (By Mr. Davis) So Mr. Commissso was not the
21 gatekeeper of the DigitalNet documents that you
22 were able to review; is that correct,
23 Mr. Naviloff?

24 A. That's correct.

25 Q. Is it also fair to say that you reviewed a

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1 great many bank records in this case?

2 A. Yes, that's correct.

3 Q. And did those bank records include the

4 DigitalNet bank records?

5 A. Yes, they did.

6 Q. And did they also include the ASA Consulting

7 bank records?

8 A. Yes, they did.

9 Q. And did they also include Mr. Alrai's and his

10 wife's bank records?

11 A. I believe so, yes.

12 Q. And did you also review investment accounts

13 that Mr. Alrai and his family held?

14 A. I believe we had some information with respect

15 to transfers for investment accounts.

16 Q. And did you also have information about real

17 estate purchases that Mr. Alrai had made?

18 A. Yes.

19 Q. And did you also have information about

20 \$1.2 million that Mr. Alrai transferred to

21 Pakistan?

22 A. Yes, that's correct.

23 Q. And did you also have tax records for ASA

24 Consulting?

25 A. Yes, that's correct.

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1 Q. And did you have tax records that reflected the
2 supposed business expenses and revenues of
3 DigitalNet?
4 A. Yes, I did.
5 Q. And did you also have all of Mr. Alrai's own
6 personal income tax filings?
7 A. Yes, I believe I did.
8 Q. And did all of those documents inform your
9 judgment about personal enrichment by
10 Mr. Alrai?
11 A. Yes, they did.
12 Q. And did you also have credit card records that
13 showed Mr. Alrai's credit card expenditures
14 over years of conduct?
15 A. Yes, I did.
16 Q. Now, for any of the documents we've just
17 discussed, did Mr. Comisso serve as some sort
18 of gatekeeper?
19 A. No, he did not.
20 Q. Was he the puppet master of what you were able
21 to review in formulating your opinion?
22 A. Not at any point.
23 Q. All right. Let's talk a little bit about
24 Ryan Gilpin.
25 How old is Mr. Gilpin?

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1 A. Well, 2020, so I'm doing my math in the head.
2 I believe that he's in his late 20s.
3 That's a guess.

4 Q. And are you familiar with his educational
5 credentials?

6 A. Yeah. So he's got a bachelor's degree in
7 computer information systems, and a master's in
8 information technology, I believe, from
9 Bentley -- both from Bentley.

10 Q. And when did he earn his master's degree in
11 information technology?

12 A. I believe it was 2007. I'm serving from
13 memory. 2017, sorry.

14 Q. And did he do work in the field prior to
15 obtaining his master's degree in information
16 technology?

17 A. Yes. My understanding is he had worked with
18 the information technology departments at his
19 university prior to being employed by RSM.

20 Q. And for how many years?

21 A. I believe it was two years.

22 Q. And do you know if he also worked in management
23 consulting in IT?

24 A. For RSM, yes, for approximately two years.

25 Q. And so was that before his assignment to work

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1 on this particular loss analysis?

2 A. Yeah, that's my recollection.

3 Q. And do you know what his management consulting
4 work was done in?

5 A. The area in and around IT outsourcing. It
6 included automation and digital transformation.
7 It included IT consulting services that
8 included RSM's various software and hardware
9 solutions that we deliver to our clients.

10 Q. And so has it been your experience with
11 information technology that sometimes, young
12 people are really indispensable to
13 understanding complicated IT stuff?

14 A. Yeah, that's been my experience. And Ryan did
15 a great job throughout this project.

16 Q. That's why Mr. Davis relies on Mr. Hunter all
17 the time.

18 MS. LE: I'm also called upon to help John
19 with IT issues. I just want to point that out.

20 MR. DAVIS: I'm not going to comment on
21 Ms. Le's age, Your Honor.

22 THE COURT: I'd pass that one up too.

23 Q. (By Mr. Davis) So, Mr. Naviloff, did you
24 regard Ryan Gilpin as essentially an
25 unqualified college intern who found himself

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1 working on this project?

2 A. Those would absolutely not be my words. He's a
3 bright young IT professional who performed well
4 in the limited role that I provided to him,
5 which was really fact-finding, and analyzing
6 invoices, and putting facts together, right,
7 with respect to information contained on the
8 documents that were provided.

9 Q. And when you were engaged by United Way to be
10 an expert, did you believe that what you were
11 supposed to do was to do all of the work on
12 that account yourself and bill at your rate?

13 A. United Way couldn't afford that. But, yeah --
14 no, it's not how any of the projects I've ever
15 worked on would transpire.

16 Q. Can you explain that a little more? What do
17 you mean by that?

18 A. Yeah.

19 If you're doing basic data entry, you're
20 not going to have a 20-plus-year experienced
21 professional, at over \$500 an hour, typing data
22 into a spreadsheet; right? So a lot of what we
23 were doing was a data-intensive collection of
24 invoice details so that we could put them in
25 spreadsheets, so that we could then read/review

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1 the specific text next to those descriptions,
2 putting them in, collating them, and organizing
3 them. So there's some amount of just
4 digitizing and structuring data organization.
5 That's not work that would be done by
6 senior-level individuals.

7 Q. Were you doing something deceptive or secret
8 from your client, United Way, by using
9 associates on various parts of the project?

10 A. No. This is common industry practice.

11 MR. DAVIS: No further questions.

12 THE COURT: Thank you.

13 Any redirect, Ms. Brown?

14 MS. BROWN: Yes, a couple of things.

15

16 REDIRECT EXAMINATION

17 BY MS. BROWN:

18 Q. Mr. Naviloff, when you were cross-examined at
19 trial about your own lack of expertise in the
20 area of IT and you were cross-examined on that
21 by Attorney Harrington, your response wasn't
22 "Hey, I've got this young guy who's really
23 good. We all know young people are better at
24 IT."

25 You didn't say that, did you?

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1 A. Did I say I had 1,200 consultants at RSM who
2 provide IT services? Did I say -- yes, I
3 have Diego Rosenfeld informing me --

4 THE COURT: Mr. Naviloff, answer the
5 question.

6 THE WITNESS: Did I mention Ryan by name?
7 I'd have to go back. I don't know.

8 Q. (By Ms. Brown) My point is that when you were
9 confronted with the lack of your own expertise,
10 your go-to response was to say, "I've got a
11 seasoned IT expert on my team"; that was your
12 go-to response; correct?

13 A. And that's an accurate statement.

14 Q. Yes.

15 And having a seasoned IT expert on your
16 team would add more credibility to your
17 opinions than, say, "I consulted with someone
18 right out --three, four years out of college."

19 That's why you went with the experienced
20 person as an example of someone you consulted
21 with --

22 A. I believe my testimony was -- speaks for
23 itself, but it was reference to Diego Rosenfeld
24 and his team. It was clear. There was no real
25 ambiguity. There was no trickery here.

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1 Q. Now, the Government asked you several questions
2 about the fact that you weren't asked about
3 personal enrichment today, but that you
4 testified about it at trial; correct?

5 A. Sorry. Say that again.

6 Q. Okay. Maybe I spoke too fast.

7 When you were just examined by
8 Attorney Davis, he asked you several questions
9 about the fact that at trial, you testified on
10 personal enrichment by Mr. Alrai or unjust
11 enrichment by Mr. Alrai.

12 A. Yes, that's correct.

13 Q. And that you weren't asked questions by me
14 earlier during direct examination.

15 That was a question Attorney Davis asked
16 you; correct?

17 A. Correct.

18 Q. Now, a person's enrichment, in and of itself,
19 doesn't prove that they committed fraud; right?

20 A. Well, I'd been asked to assume fraud occurred.
21 I'd performed two calculations, right, to
22 quantify the amount.

23 Q. I understand you were asked to assume fraud.
24 Which means if you were asked to assume fraud,
25 you were not -- at least to what your position

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1 is, you were not offering testimony to prove
2 fraud; correct?

3 A. That's correct. I was quantifying the loss in
4 the enrichment.

5 Q. So you didn't offer any testimony to show or to
6 prove that there was excessive billing in this
7 case; right?

8 A. The monies that went into Mr. Alrai's accounts
9 was from United Way. That, I saw in the
10 records.

11 Q. I'm trying to get back to the fact that you
12 have said and the Government has said you
13 didn't offer testimony regarding fraud;
14 right -- that's your testimony today?

15 A. That's fair. Yes, I'm assuming fraud.

16 Q. So if you're assuming it, you're not proving
17 it; right?

18 A. That's correct.

19 Q. So if you're not proving fraud, then your
20 testimony -- you weren't attempting to prove
21 excessive loss. You were just attempting to
22 show evidence of the loss -- excuse me.

23 You weren't trying to prove excessive
24 billing; you were trying to prove the loss
25 associated with this excessive billing;

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1 correct?

2 A. There's a distinction. I guess I'm trying
3 to pick up what you're distinguishing between.

4 Q. I guess what my point is is that the Government
5 has represented several times, both before
6 trial and after trial, that you were not called
7 as a witness to prove fraud; is that your
8 understanding?

9 A. Yes.

10 Q. You were told to presume fraud and then get to
11 the next step, which was if there was fraud,
12 what was the loss associated with it?

13 That was your understanding of the purpose
14 of your testimony?

15 A. Right. That's the trier of fact to prove
16 fraud.

17 Q. And if you were assuming that fact and not
18 proving it, then your testimony did not
19 establish that there was fraud; if anything, it
20 only established that -- what the loss was if
21 there was fraud?

22 A. Correct.

23 Q. And so to the extent that there was quote,
24 unquote, "unjust enrichment" on the part of
25 Mr. Alrai, that would be completely irrelevant

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1 if there was no fraud; right? If he had money
2 in that period of time, and got credit cards,
3 and bought clothing, or whatever he bought --
4 or houses, but there was no proof of fraud,
5 having more money by itself doesn't prove that
6 you committed fraud?

7 A. If that was a legitimate business, then, yeah,
8 having excess -- having excess profits is what
9 it is; right?

10 Q. Right.

11 And "legitimate" being the operative word
12 here. So either it's legitimate or it's not
13 legitimate, and that was what the issue was at
14 trial in terms of whether he committed fraud;
15 right?

16 A. Yeah. So we looked at it.

17 Undelivered, overbilled, right, or
18 duplicative; right? So those, by their nature;
19 right -- if you're being paid twice, it could
20 be problematic; right? Not delivering services
21 can be problematic, but those are contractual
22 issues and concerns as well.

23 Q. But what you're admitting is -- you're
24 admitting that you made a conclusion that he
25 had been unjustly enriched; but the conclusion

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1 was based on a premise that may or may not be
2 true, but you didn't offer opinions on the
3 premise of whether he committed fraud?

4 A. Correct.

5 MS. BROWN: Nothing further.

6 THE COURT: Mr. Davis?

7 MR. DAVIS: You know, I have really just
8 one question.

9

10 RECROSS-EXAMINATION

11 BY MR. DAVIS:

12 Q. And it doesn't go so much into any kind of
13 disclosure. It goes to more the job you were
14 given in this case.

15 The idea of assuming fraud and then
16 opining on a loss, which is what you're charged
17 with here; right? I mean, obviously, it wasn't
18 as simple as deciding -- taking a date that he
19 started and picking a date that he ended, and
20 attributing all economic loss to the fraud;
21 right? That's not how it's done.

22 A. So from start to finish; right? So I've used
23 two calculations.

24 Q. Yeah.

25 A. And these are estimates based upon the records

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1 I've been able to look at. So nothing is
2 necessarily perfect when you don't have every
3 granular detail. But the first approach was to
4 measure those three elements, right, where
5 there were clear markups for reoccurring
6 services that were related to the technology;
7 right? So, essentially, paying extra for
8 bandwidth or paying extra for server --

9 Q. I've got to stop you.

10 I understand all that.

11 A. Okay. Got you.

12 Q. What I'm saying is, you didn't just simplify --
13 simplistically pick two dates, start of
14 employment and end of employment, and attribute
15 everything to fraud; right -- that's not the
16 way you did it?

17 A. No. That's not now I calculated 3.1. There
18 was lots of activities that could have been
19 legitimate that never made its way into the
20 3.1.

21 Q. You're drawing exactly what I am --

22 A. Yeah.

23 Q. Here's my problem -- this idea of assuming loss
24 and -- assuming fraud and establishing loss.
25 To prove fraud, you've got to prove causation.

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1 You've got to prove that the fraudulent
2 activity -- the conduct resulted in a loss of
3 some amount.

4 So isn't the idea of a loss inextricably
5 tied to specific different instances of
6 fraudulent conduct? You can't just assume
7 every dollar lost in the time period is
8 fraudulently lost. It's got to be attributed
9 to something, some conduct of the Defendant.

10 Didn't that require you to make judgments
11 about what conduct was fraudulent?

12 A. The formation of the business; right. So that
13 business as a whole -- the way it was developed
14 was fraudulent. And that's what we've been
15 asked to assume. So the business, in and of
16 itself -- there's no practical need, if you're
17 an IT director, to go and create another
18 business that then marks up these costs and
19 then just passes them back to United Way;
20 right? So the very construct of the business
21 is what was -- in my understanding, is what the
22 concern is.

23 Q. You mean DigitalNet?

24 A. Yes.

25 Q. Okay.

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1 A. Sorry, DigitalNet, yes. So that's the nexus
2 for me; right.

3 As soon as you say, "Okay. I created an
4 entity, and this is what I do for a living" --
5 this isn't novel. An entity is set up; right?
6 It's not transparent. And it's making excess
7 profits; right?

8 MR. HUNTER: Your Honor, I can speak to
9 what we asked him to assume specifically, which
10 is -- and this is in his report. We asked him
11 to assume that Alrai fraudulently obtained all
12 the contracts between United Way and
13 DigitalNet.

14 And so the idea being is as Mr. Naviloff
15 just said -- because he fraudulently obtained
16 the contracts, any loss associated to that is
17 fraud as part of the scheme to defraud that was
18 proved at trial.

19 THE COURT: Any loss associated with that;
20 right? To be honest, I've been debating all
21 morning whether I should ask Counsel this
22 question or ask the witness, to be honest.
23 And, you're showing me where they both make
24 sense, but I just wanted the witness' take on
25 it.

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1 So any loss that you bring to that
2 business -- does that mean any dollars paid to
3 that business? No -- right? It doesn't,
4 because it has to be excess dollars, dollars
5 that wouldn't have otherwise -- right?

6 THE WITNESS: Yes.

7 THE COURT: I guess all I'm trying to say
8 is that I understand it's part of the
9 Government's argument that this testimony
10 didn't go to anything but loss; right? Other
11 witnesses, other evidence established the
12 Defendant's fraudulent conduct. But I think
13 that is a -- that's a difficult concept,
14 because the idea -- to me, the idea of opining
15 on loss requires not just assumptions that a
16 fraudulently created business leads to loss,
17 but that certain conduct by the business -- and
18 certain conduct by the business actually caused
19 loss -- not everything the business did. Now
20 I'm opining.

21 But you're nodding, Mr. Naviloff. You
22 understand what I'm saying?

23 THE WITNESS: Yes, I do.

24 THE COURT: I'll probably talk to Counsel
25 more about that at some point in this

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1 proceeding, but, thank you.

2 I think the witness is excused.

3 MS. BROWN: Your Honor, real briefly,
4 there's just one question I have on this. And
5 it's on this exact thing, so hopefully it will
6 illuminate.

7 I apologize. I did not make this an
8 exhibit, but there was an email about this.

9 And I can -- I'll just share with the
10 Government, it's -- of the recent production,
11 it ends in 00-4-A. But it's an email about
12 this, and I just want to ask a question about
13 this.

14

15 **REDIRECT EXAMINATION**

16 BY MS. BROWN:

17 Q. So this email's dated November 7, 2018. It's
18 from Fitzgerald to Naviloff. And I just want
19 to read.

20 It says, "Greg, here are a list of items
21 that I would ask the USAO about. One is
22 consideration of the 'net work method'" --
23 that's in quotes -- "analyze Alrai's networth
24 at 12/31/2011 versus 6/30/2018. Change in
25 networth, less known income salary and known

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1 expenses, mortgage, fraudulent proceeds." And
2 it basically explains whether he's using the
3 money for other things like developing an app
4 or sending money to Africa.

5 So I wanted to ask the witness, was that a
6 discussion that you had with the U.S.
7 Attorney's Office prior to indictment? Because
8 that's about, I think, three weeks or two weeks
9 before the indictment.

10 Do you remember having a conversation
11 about using the "net work method"?

12 A. Yeah, I don't think I did. I know that was
13 something that Chris was suggesting. But at
14 that point, we hadn't been engaged to do
15 anything. I think there was just a question
16 mark as to -- and Chris perhaps being overeager
17 to figure out whether there was additional
18 analyses that could benefit the Government.

19 Whether we did that work or someone else
20 did that work, there were certainly other
21 analyses that would further serve to assist the
22 Government in their efforts, apart from the
23 work that we had done just to date with the
24 loss analysis.

25 Q. And that is not an analysis you did when you

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1 **were working for United Way?**

2 A. No.

3 MS. BROWN: Thank you, Your Honor.

4 THE COURT: Thank you. All right.

5 Mr. Naviloff's excused.

6 Ms. Brown, you can call your next witness.

7 MS. BROWN: Attorney Eaton is going to
8 call Mr. Sgro.

9 THE COURT: Please proceed, Mr. Eaton.

10 MR. EATON: Can the Court swear Mr. Sgro
11 in?

12 THE CLERK: Mr. Sgro, please raise your
13 right hand.

14 Do you solemnly swear or affirm that the
15 testimony you're about to give will be the
16 truth, the whole truth, and nothing but the
17 truth, so help you God?

18 MR. SGRO: I do.

19 THE CLERK: For the record, please state
20 your full name and spell your last name.

21 MR. SGRO: It's Jason Joseph Sgro,
22 S-G-R-O.

23 THE CLERK: Thank you.

24

25

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1 DIRECT EXAMINATION

2 BY MR. EATON:

3 Q. Mr. Sgro, did you review the Defendant's motion
4 to dismiss, and the Government's objection to
5 that motion, and the other related pleadings?

6 A. I did.

7 Q. Did you also review the documents that had been
8 produced after trial?

9 A. I did.

10 Q. And did the Defense ask you to write a report
11 about your expert opinions related to that
12 motion to dismiss and the newly discovered
13 evidence?

14 A. Yes, they did.

15 Q. In writing that report, did you review the
16 trial transcripts in this matter?

17 A. I did.

18 Q. And did you address how the new discovery
19 impacts Mr. Naviloff's filings as to the
20 categories of loss?

21 A. Yes, I did.

22 Q. And do you recall the categories of loss that
23 Mr. Naviloff analyzed?

24 A. Yes. That's duplicative billing, billing for
25 services not rendered, and excessively billing.

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1 Q. So we're going to talk about some examples,
2 and -- most of which you cite in that report of
3 the new discovery -- and how that would have
4 impacted your testimony. So let's start with
5 excessive billings, of the three categories.

6 Are you aware that in finding Mr. Alrai
7 guilty, the Court made a finding that there
8 was, in fact, excessive billing, or
9 astronomically excessive markups?

10 A. I am aware of that, yes.

11 Q. And do you recall that Mr. Naviloff testified
12 as to excessive billing or markups?

13 A. Yes, I do recall that.

14 Q. And do you recall that testimony was with
15 respect to the telephony system?

16 A. Yes. I believe it was with regard to the
17 company SIP.US.

18 Q. Can you briefly describe what that opinion was?

19 A. Yeah.

20 So Mr. Naviloff presented an opinion that
21 there was a really high markup -- I won't be
22 exact here, but, like, 800 percent or more on
23 the SIP.US. service as part of a markup for the
24 telephony services between DigitalNet and the
25 United Way.

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1 Q. And did you give testimony about that
2 particular opinion?

3 A. I did.

4 Q. And what was that testimony?

5 A. So I believe that that's not accurate for a
6 couple reasons, first of which being that if
7 you look at the invoices for SIP.US -- to
8 between the SIP.US company and DigitalNet,
9 they're a couple hundred dollars a month --
10 something in that realm. Excuse me that I'm
11 not being precise.

12 And then if you look at the invoices for
13 the entire managed telephony service between
14 DigitalNet and the United Way, it appears that
15 Mr. Naviloff is comparing those and assessing
16 that that's an apples-to-apples comparison,
17 when, in fact, SIP.US is a general fraction of
18 what it would cost to produce a telephony
19 service -- an actual working telephone. And
20 just to put that in really easy terms, if you
21 were to buy just SIP.US and pick up the phone,
22 you don't get a dial tone. Like, nothing
23 happens. It's a part of a system.

24 And so to say that that is the totality of
25 the cost, and, thus, the markup must be all of

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1 these -- you know, a 1,000 percent or
2 800 percent or something, it is not accurate.

3 Q. Is there a specific document that you reviewed
4 from the newly produced posttrial discovery
5 that would have bolstered your opinion on the
6 erroneous analysis that Mr. Naviloff gave as
7 this issue?

8 A. Yes, there is.

9 MR. EATON: Tracy, can you pull up
10 Exhibit Pp?

11 (Pre-marked Defendant's Exhibit Pp
12 introduced.)

13 Q. (By Mr. Eaton) Mr. Sgro, is this one of the
14 documents that you looked at with regard to a
15 SIP.US issue?

16 A. Yes. This appears to be one of them, yes.

17 MR. EATON: And what -- actually, I'll
18 have -- Tracy, if you can pull out the bottom
19 half of that email, starting with "all" and
20 going -- yeah, perfect.

21 Q. (By Mr. Eaton) So can you tell me, Mr. Sgro,
22 what this email says to you in terms of
23 Mr. Naviloff's opinion?

24 A. Yeah.

25 So I believe -- I can't see the top, but I

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1 believe that essentially, what this is is this
2 is a conversation that is happening with a
3 person by the name of Mark Amick, who is the
4 COO at this SIP.US company. And he is
5 confirming that the service -- the account was
6 set up in October 2014. The service was active
7 beginning November 2014. And it talks briefly
8 about the DID cost and 911 costs of the
9 service.

10 Q. Now, would having this information have
11 bolstered your ability to respond to any claim
12 that Mr. Naviloff made with regard to SIP.US
13 service at trial?

14 A. Yes.

15 So this is important because this starts
16 to show some of the cost modeling of SIP.US, as
17 well as the service (audio drops) --

18 Q. I'm sorry. I missed that last part.

19 THE COURT REPORTER: Same.

20 THE WITNESS: I apologize. That was -- it
21 talks to some of the cost modeling of SIP.US,
22 as well as how many numbers were associated
23 with the account and the start date of the
24 service.

25 Q. (By Mr. Eaton) Okay.

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1 Now, do you recall at trial that
2 Mr. Naviloff asserted that the contract for the
3 management of the phone system that he was
4 reviewing, which was signed in 2013, relates
5 directly to the management of SIP.US? Do you
6 recall, generally, that testimony?

7 A. Yeah, I do recall that. And I did testify, I
8 believe at trial as well, that this timeline is
9 inaccurate; right? He is asserting,
10 incorrectly, that the -- a contract that is
11 signed, oh, a year, roughly, before this
12 service exists in the context of the United Way
13 is somehow to manage that service.

14 Q. So now more broadly with respect to
15 Mr. Naviloff's opinion in terms of excessive
16 billing and markups, and based on this email
17 and the testimony that he gave at trial, what
18 does this tell you about his knowledge of
19 SIP.US versus a traditional, copper
20 wire-supported phone system?

21 What does it tell you about the validity
22 of his opinions when he's talking about this
23 telephony system?

24 A. Yeah, so, I think we can clearly see, because
25 of the not apples-to-apples comparison that is

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1 made over the costing, as well as kind of a
2 confusion about when contracts are signed and
3 what technical services those contracts belong
4 associated to shows that -- and I believe
5 Mr. Naviloff has asserted this as well -- that
6 he's not an IT expert. And, yeah, so I would
7 say that that shows his lack of expertise in
8 this area.

9 Q. Do you recall being cross-examined about the
10 various markups in this case?

11 A. I do.

12 Q. And do you also recall that the Judge asked you
13 at trial about your opinions on the markups?

14 A. I do.

15 Q. And do you recall your reply in reference to
16 these questions on markups was that you
17 couldn't say they were reasonable because you
18 weren't able to evaluate the service?

19 A. Yeah. So there's a couple -- there's always
20 some ways of kind of getting to the heart of a
21 technical analysis. And one of the things that
22 would have been good to do is not only take the
23 SIP.US costs, but also an evaluation of the
24 other services -- the telephony phone-specific
25 services. These are things like network,

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1 voicemail, engineering management -- the actual
2 software licensing that the phone runs.

3 All of this should be a part of an
4 analysis of what the cost was to deliver the
5 telephony service, as a comprehensive-managed
6 telephony service, in order to present a
7 correct analysis of this.

8 Q. So I'd like to now turn to "Duplicative
9 Billing," the second of the three categories.

10 Are you aware as well that in finding
11 Mr. Alrai guilty, the Judge made a finding that
12 there was, in fact, duplicative billing?

13 A. I am aware that he made that finding.

14 Q. And do you recall whether Mr. Naviloff
15 testified about duplicative billing?

16 A. Yes, I believe he did.

17 Q. Do you recall that testimony regarding
18 duplicative billing as to a service called
19 CloudConnect?

20 A. Yes, I do recall that.

21 Q. Can you briefly, if you can recall, describe
22 what that opinion was in terms of duplicative
23 billing?

24 A. Mr. Naviloff's opinion?

25 Q. Yes.

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1 A. So Mr. Naviloff believed that during a period
2 of some time, that there was duplicate invoices
3 sent for similar or the same, I think, in his
4 opinion, services. And, thus, those invoices
5 were duplicative.

6 Q. And what was your response to that opinion?

7 A. I don't find -- this goes to kind of my
8 approach here.

9 I made no assumption of fraud; right? So
10 I'm here to look at the actual facts in the
11 environment that were presented, and analyze
12 them as objectively as is reasonable for me to
13 do so. And so when you look at the data about
14 those services, you actually -- you can't come
15 just to the conclusion that these are
16 duplicative. And that's for a bunch of
17 reasons; right?

18 The first of which is they are -- services
19 can be transitioned; right? So that's when a
20 company maybe starts one service and ends
21 another, you overlap them for a time period;
22 right? That's a reasonable -- that's a reason
23 for having maybe a duplicate invoice.

24 You could also have the services in
25 simultaneity, right, as a capacity. And these

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1 are -- when you read these contracts, they are
2 not identical in every sense of the word from a
3 technical standpoint. So there's a couple of
4 different options that could be possible here,
5 some circumstances where they would not be
6 duplicative. And if you don't assume fraud, I
7 think you don't necessarily choose the
8 narrative that supports fraud.

9 MR. EATON: So I'd like to look at another
10 post-trial discovery email.

11 And, Tracy, if you could pull up Nn. And
12 can you zoom in on, I guess, the first half of
13 the page or so? Hopefully, that will be big
14 enough. That's good.

15 (Pre-marked Defendant's Exhibit Nn
16 introduced.)

17 Q. (By Mr. Eaton) Can you see that?

18 A. I'll do my best.

19 Q. Yeah, let us know. We can zoom into it further
20 if there's something you want to discuss.

21 So I want -- you just mentioned that there
22 are plausible explanations for why two services
23 could be billed at the same time, even if they
24 appear similar.

25 And "plausible" was the word that you used

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1 to describe that possibility at trial; right?

2 A. Yeah, I believe that that's a reasonable
3 alternative circumstance, yep.

4 Q. But you didn't -- you didn't have anything to
5 point to; right? You could speculate that
6 there could be these reasonable alternatives,
7 but you didn't have any document to show, like,
8 yep, this is what was happening?

9 A. No. I was certainly devoid of any information
10 like what we're looking at right now.

11 Q. And that's a perfect segue.

12 Can you tell us what we're looking at
13 right now, and how that fits into what we're
14 discussing?

15 A. So this appears to be an email from
16 Mr. Ryan Gilpin to Chris Fitzgerald, copying
17 Mr. Naviloff and a person by the name of
18 Evan DaSilva -- apologize if I mispronounce
19 that -- talking about the CloudConnect
20 duplicative billing. Again, I'm just kind of
21 summarizing.

22 And the -- over the -- Mr. Gilpin is
23 saying in the maybe third paragraph down,
24 "There may have been some overlap in the
25 services provided by Insight and CloudConnect,

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1 as it appears that the contract start for
2 Insight overlaps within a few months of the
3 CloudConnect contract, from approximately
4 January to April. And it would appear that the
5 majority of the services rendered by
6 CloudConnect exists roughly between 2012 and
7 2016."

8 And he's talking about kind of the -- he
9 does goes on -- or before to talk about the
10 types of environments. And, actually, I'll
11 read from this as best I can. Because, again,
12 it is small.

13 "The three-month overlap in services could
14 be explained by a change in access
15 technologies, as it would appear to take some
16 time to get people up to speed on how --
17 official and new technology."

18 So I think he's talking about a potential
19 transition of technologies here.

20 Q. And that was precisely what you were trying to
21 explain at trial, but for which you didn't have
22 any --

23 A. Yeah. Again, so I was never able to take a
24 look at this environment, and so I can't say,
25 one way or the other, what the exact purpose of

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1 these two different cloud environments were --
2 whether one was replacing the other, or whether
3 they were intended as services that would be
4 kept in parallel, or what have you.

5 I just know that I think Mr. Gilpin and I
6 both came to a similar conclusion that this
7 might actually be a transition of services.
8 And I think that speaks to just that it is a
9 likely possibility. Instead of duplicative
10 billing, it could just be transitional billing.

11 Q. Now, when you were consulting with defense
12 counsel prior to trial, did you advise them to
13 get discovery from RSM, or United Way, or the
14 Government regarding the basis of these
15 opinions such as duplicative billing?

16 A. Yeah. So I advised Counsel to make various
17 discovery requests, searching, again, for more
18 information about how some of these opinions
19 were being rendered.

20 Q. And was part of that because on paper, it
21 didn't technically -- it wasn't -- when you
22 read it, it wasn't technically correct, but you
23 couldn't point to the source of the errors; is
24 that --

25 A. That's absolutely true. And so this is part of

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1 why when you're doing an accounting -- and,
2 again, accounting -- forensic accounting is
3 beyond my scope. That's why I rely on somebody
4 like Mr. Kennedy, which I did during trial and
5 whatnot, and why I'm sure Mr. Naviloff would
6 rely on associates or whatnot.

7 When you're looking at technical services
8 and the cost to deliver technical services or
9 something like that, it's important to look at
10 them through a technical lens. And what I mean
11 by that is it's important to understand what
12 the service really is, how it is used. And,
13 so, yes, it's absolutely important that we look
14 at this kind of through that technical lens.

15 Q. And did you receive any documents that were
16 responsive to this request to get the
17 underlying technical analysis?

18 A. No. No, we did not.

19 Q. Before trial, I should say?

20 A. Before trial, we did not.

21 Q. And then after trial, did you, in fact, receive
22 some of those documents?

23 A. Yeah. So there were documents that were
24 produced after trial, which I'd be happy to go
25 through.

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1 Q. So before we get into the documents themselves,
2 what did you find in your review of the
3 posttrial discovery as to who was kind of
4 behind providing these IT assessments
5 underlying Mr. Naviloff's opinions?

6 A. Yeah. So we learned about Mr. Gilpin,
7 primarily, and that he was the person doing --
8 I would say, for lack of a better term -- the
9 legwork of collecting and potentially
10 analyzing -- kind of putting the -- offering
11 the technical lens by which some of this data
12 was presented. I know that these emails show
13 that Mr. Naviloff was aware of this activity
14 and his involvement.

15 Q. And have you reviewed Mr. Gilpin's
16 credentials -- his qualifications?

17 A. I have.

18 Q. In your review of his qualifications, do you
19 believe he is qualified to be providing IT
20 expertise and analysis?

21 A. No. So while I would agree that the use of
22 associates is absolutely a common business
23 practice -- I use associates myself -- their
24 work has to be closely monitored and -- closely
25 and effectively monitored and reviewed by a

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1 knowledgeable technical expert to make sure
2 that they're on the right track, providing good
3 data.

4 Somebody who is in their second year, kind
5 of recently promoted -- a sophomore associate,
6 if you will -- is certainly not somebody that I
7 would like to provide kind of a primary voice
8 in providing technical expertise. I think that
9 both his experience, time, and industry, and
10 some of the analyses that he's provided here,
11 show his inexperience and perhaps his unfitness
12 as an expert.

13 Q. So let me ask you this.

14 You heard Mr. Naviloff just testified
15 today; right?

16 A. I did.

17 Q. Now, he described what Mr. Gilpin was doing as,
18 quote, "rather straightforward," and something
19 that he would expect any first- or second-year
20 associate to do -- this technical analysis that
21 we're speaking of.

22 Do you agree with that?

23 A. I actually don't agree with that. I think that
24 that really simplifies a complex equation in a
25 way that I don't think is appropriate.

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1 These cloud environments are highly
2 complicated. The technology, in kind of
3 laymen's terms, is like a mattress; right?
4 Excuse the example. You don't know what's
5 inside of it; right? You can look at two
6 mattresses and they look like the same thing,
7 but one of them is super cheap, and one of them
8 is expensive. And if you don't have a
9 knowledgeable expert to tell you what's inside
10 the mattress and how those parts go together,
11 then your analysis of that is -- can be
12 fundamentally flawed by that; right?

13 And so that is part of what I see the --
14 my own role and the role of the IT experts in a
15 case is to really illuminate some of the more
16 complex subject matter, which I think
17 Mr. Gilpin was ineffective in doing here.

18 Q. Now, Mr. Naviloff also noted that the buck
19 stops with him, basically. That he was doing
20 quality control. And I guess --

21 THE COURT: Mr. Eaton, let me interrupt
22 you.

23 It's been 90 minutes. I want to give the
24 reporter a break. So we will take 15 and
25 reconvene at about 3:25.

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(Recess taken at 3:08 p.m., and the proceedings resumed at 3:25 p.m.)

THE COURT: Go ahead, AUSA Le.

MS. LE: Hi, Judge. Just two things.

Number one, I don't think we're going to get to Mr. Meyer today, considering the Court's scheduled discussion earlier.

So would it be okay if we release Mr. Meyer and he can still be under sequestration? This way he's not on for extra hours.

THE COURT: Yes.

MS. LE: Thank you. So we'll let him know that.

Charli, can you relay that information to him, please?

THE CLERK: I can, yes.

MS. LE: Thank you.

And, number two, Judge, we had originally planned this until about noon. I'm going to have childcare issues at about 4:00. I just wanted to apologize that my daughter might be coming home, and so I might ask for just a few minutes to get her situated, and then I'll be back on the screen, if that's okay as well.

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1 THE COURT: Of course.

2 MS. LE: Thank you.

3 THE COURT: All right.

4 Go ahead, Mr. Eaton.

5 MR. EATON: Thank you, Your Honor.

6 Tracy, can you pull us Exhibit Ff?

7 Q. (By Mr. Eaton) So, Mr. Sgro, we were just
8 talking about Mr. Gilpin. And you were
9 describing why IT expertise is necessary to --
10 with regard to the IT assessments that underlie
11 Mr. Naviloff's opinions.

12 Have you had a chance to review this
13 email?

14 A. Yes, I have.

15 Q. And, actually, we've seen this email today as
16 well. So can you zoom in on the first half of
17 that email, just down to the RSM logo? Yes,
18 that's good.

19 So what does this tell you in relation to
20 the IT assessments that were performed in the
21 process of calculating the categories of loss?

22 A. Yeah. I think, as was kind of discussed before
23 too, this is an email from Chris Fitzgerald to
24 Mr. Naviloff where they're talking about the
25 potential -- or a calculation of downtime

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1 percentage -- 99.9 percent, and how many hours
2 that would be.

3 And Mr. Fitzgerald raises a concern that
4 the USAO, and I'll quote, "The USAO is relying
5 solely on Ryan, who is only a newly promoted
6 senior associate." And that Diego -- who I
7 take to be Diego Rosenfeld, needs to testify,
8 you want him to basically be aware -- agrees
9 with and be aware of what's being presented to
10 Counsel here.

11 And I think that both corroborates my
12 concerns about Mr. Gilpin's fitness to do this
13 unsupervised. It seems like, to some degree,
14 it's possible that he is doing this in a way
15 that at least Mr. Fitzgerald feels would
16 require more involvement from Diego Rosenfeld.

17 Q. Okay.

18 And as you heard, Mr. Naviloff was
19 discussing how he provides a quality control.
20 These are his opinions. So even though he
21 might take explanations from Mr. Gilpin, he's
22 kind of vetting them to make sure they align
23 with his opinions so that he can incorporate
24 that.

25 Is that -- knowing Mr. Naviloff's

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1 qualifications and his areas or expertise, is
2 that kind of a proper --

3 A. Yeah. So I find that to be problematic, only
4 because, again -- to use my mattress analogy,
5 which hopefully does not come back to haunt me
6 in cross-examination -- but I know that
7 Mr. Naviloff, by this email, is aware of
8 Mr. Gilpin's involvement. I know that he's
9 saying that these are his opinions, and he's
10 the quality control person. However, you have
11 to have the expertise to know what a good
12 quality technical analysis or a poor quality
13 technical analysis is in order to -- in order
14 to be the quality control gate; right?

15 So this is why if I go into -- if I'm
16 dealing with something in forensic accounting,
17 I rely on an expert in that field, and I stay
18 kind of within my scope of practice. I think
19 it's important for all experts to kind of know
20 where they begin and end, and not try to put
21 their arms around too much. Because, contrary
22 to the testimony I think we heard today by
23 Mr. Naviloff, my opinion would be that some of
24 this stuff is actually pretty hard to figure
25 out.

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1 And Mr. Naviloff did say earlier in his
2 testimony as I was listening that, perhaps
3 during trial, I was suggesting that maybe some
4 of this was just too hard to figure out. And
5 that's not what I'm saying at all. I'm just
6 saying that when you're analyzing this, you're
7 analyzing technical services and technical
8 contracts, and you need to have the voice of a
9 technical expert to inform that opinion in
10 order for those numbers to really be valid.

11 Because when you look at them just at a
12 contract level, it is quite easy to make
13 mistakes. It's not cut-and-dry. It can be
14 complicated.

15 Q. Okay. So with that, I'll turn to the third
16 category of loss that you spoke about, and
17 that's "services not rendered."

18 And, Tracy, if you could pull up
19 Exhibit 00 and then go to page three of that
20 exhibit. And can you zoom in on that "services
21 not performed" paragraph?

22 Have you seen this document Mr. Sgro?

23 A. I have.

24 Q. And what does this tell you in terms of what
25 we're discussing -- the technical assessment

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1 underlying this --

2 A. First of all, it lets me know that there is
3 some kind of technical assessment happening,
4 which -- and this document is produced after
5 trial; that is correct?

6 Q. Yes.

7 A. Yeah, I believe I recognize this from the
8 posttrial discovery.

9 This is where we learn that there is some
10 technical discovery or analysis being done
11 about -- by Mr. Gilpin, primarily. I'm
12 inferring that from this. And that there's a
13 document explaining this -- that it is their
14 opinion that these services hadn't been
15 performed.

16 Q. And you discussed that there was technical
17 assessment going on.

18 I assume -- and I'd ask you to confirm --
19 whether IT expertise is required to do this
20 assessment.

21 A. There's a couple of things that are required.
22 The first is, I absolutely -- in order to
23 assess data management and high-availability
24 backup storage, that is -- that definitely
25 requires expertise in IT to assess. And there

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1 is an assessment kind of being done here, which
2 means they're looking at an environment. And
3 that's notable to me, because I was not
4 permitted to look at any environments. I know
5 environments outside of some desktop images and
6 cellphone which were provided before trial.
7 None of these environments were provided kind
8 of for my analysis.

9 And so this is a case where -- I think I
10 was concerned in reading this in two ways. The
11 first was that there's an analysis perhaps
12 being done here by a person that does not have
13 the correct expertise to do so. And there's an
14 environment to analyze that I really have no
15 knowledge or visibility into. So this speaks
16 to Mr. Gilpin having access to an environment
17 that I don't have access to to perform any kind
18 of analysis of my own.

19 Q. So we've been through the three categories, and
20 you've discussed the lack of technical
21 expertise underlying these opinions. But,
22 well, let me ask you.

23 Have you reviewed Mr. Naviloff's
24 declaration, which was attached to the
25 Government's objection?

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1 A. I have.

2 Q. And in it, he states, quote, "My analysis is an
3 accounts analysis. It is not an IT assessment,
4 nor is my report an IT expert report." And he
5 goes on to describe his experience in
6 evaluation. He has, quote, "significant
7 experience forensically evaluating business
8 expenses and auditing financial statements,
9 including capitalized assets such as IT
10 equipment and software, as well as IT
11 maintenance and depreciation expense."

12 So do you have a response to this? I
13 mean, the suggestion is he's just doing an
14 accounting analysis. IT doesn't play a role in
15 it, so he doesn't need IT expertise.

16 What's your kind of response to that?

17 A. Yeah, so I think there's two things of note.

18 The first is that when he's asserting his
19 familiarity with IT assets and software, he's
20 speaking about capitalization and cost of --
21 not familiarity with analyzing those services;
22 right? So he's certainly, I'm sure, seen the
23 cost of a computer or something before, and
24 that's what he's talking about there.

25 But these -- an analysis of these

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1 contracts, in order to be correct, in order to
2 be accurate, can't be separated from a
3 technical analysis; right?

4 This goes back to the kind of SIP.US
5 example, where you don't realize what you're
6 looking -- without the technical analysis, you
7 don't realize that you're looking at a very,
8 very small component of a much bigger thing,
9 and then saying "the cost of this was marked up
10 to the cost of this." And Mr. Meyer, in his
11 testimony during trial, which I was present
12 for, even said for just -- let's use the
13 telephony example for telephones. He charges a
14 flat fee per month per line; right? And
15 forgive me -- I don't have the number, but it's
16 \$50, \$60, \$70 a month per line -- something
17 like that.

18 And then during this analysis -- or during
19 Mr. Naviloff's analysis and in his opinion, he
20 says, "Oh, the cost is only the SIP.US piece";
21 right? And so it's like, wait a minute.
22 You're an accountant. You can't have it both
23 ways. It's very strange.

24 And I actually gave, in my latest
25 report -- my supplementary report -- an example

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1 that I think speaks to why you can't have the
2 -- a proper financial analysis of technical
3 services without technical expertise or someone
4 with technical expertise informing you.

5 And I gave kind of a fictitious example of
6 if I sell you a car for \$25,000, and before
7 that I buy \$1,000 worth of tires -- and maybe a
8 person analyzing the \$25,000 and the \$1,000
9 invoice says, "Oh, well, you only paid \$1,000
10 for the car, and then marked it up to \$25,000,"
11 when, in fact, that's not true.

12 I'm only talking about a piece of that --
13 a very small piece of that. And so that
14 technical analysis really allows you to make
15 informed decisions about what these contracts
16 actually mean.

17 Q. Now, we've -- as you've stated, your original
18 testimony at trial indicated that there were
19 errors in the analysis.

20 Now, with this post-discovery trial, as
21 you mentioned, you know the source of those
22 errors in terms of Mr. Gilpin and the
23 inadequate IT assessments?

24 THE COURT: Mr. Eaton, he's your witness.
25 Why don't you not lead him, and why don't you

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1 conduct direct and open-ended questions?

2 MR. EATON: Okay. Sure.

3 Q. (By Mr. Eaton) So let me ask you this.

4 Why does it matter to you to be able to
5 point to the source of IT errors?

6 A. Yeah, so I think there's a couple of reasons
7 that some of this posttrial discovery is
8 important to my analysis, and I'll try to scope
9 myself there.

10 The first is that we saw the scan data;
11 right -- the technical scans that were provided
12 posttrial that were not provided pretrial, that
13 clearly show some analysis of the environment
14 being done, and there being an environment to
15 do an analysis of, which I was not provided
16 access to. I was not provided that scan data.
17 And so that really inhibits my ability to
18 inform my own opinion and to inform Counsel
19 about potential examination of expert
20 witnesses, because the one side has access to
21 things that the other side doesn't have access
22 to; right? So that's the first problem.

23 The second problem is -- what I can see
24 now is there's a reason -- and, again, I did,
25 as you correctly said -- I did, at trial, point

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1 out many of the issues that I felt were issues
2 with Mr. Naviloff's opinion. Now I can see a
3 lot of those issues are of the result of these
4 other associates or people we didn't really
5 know about before trial giving him an incorrect
6 or potentially flawed technical analysis. To
7 what degree he incorporates that or doesn't
8 incorporate that, I can't speculate as to the
9 intention of Mr. Naviloff. But I can say that
10 that appears to me to be part of why some of
11 these kinds of errors are made.

12 Q. You obviously just listened to Mr. Naviloff's
13 testimony today.

14 Other than Mr. Gilpin, did he point to any
15 other person that he gained assistance from in
16 terms of understanding IT issues?

17 A. Yeah. He referenced Mr. Meyer, which is the
18 same as he referenced kind of at trial.

19 Q. Have you reviewed Mr. Meyer's --

20 A. I have, yeah.

21 Q. -- qualifications?

22 THE COURT REPORTER: Excuse me. This is
23 the court reporter.

24 Can I please ask the witness to wait until
25 the attorney finishes his question before

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1 | answering?

2 THE WITNESS: Oh, I'm sorry.

3 THE COURT REPORTER: Thank you so much.

6 (Pre-marked Defendant's Exhibit H
7 introduced.)

8 Q. (By Mr. Eaton) So have you reviewed this?

9 A. Yes, I have.

10 Q. Okay.

11 So in your opinion, and in reviewing this
12 document, is Mr. Meyer qualified to provide IT
13 advice for assessment?

14 A. So Mr. Meyer is, I think, clearly by the --
15 objectively by this, not an IT expert, has very
16 little technical experience himself, especially
17 at engineering or understanding modern
18 technologies. His resume and experience as a
19 technical director and things predates all of
20 the technology that we are talking about today.
21 And I believe that's probably why he wasn't
22 entered as an expert at trial as well. That's
23 my speculation.

24 MR. EATON: So let's go to another
25 posttrial discovery document. This is

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Exhibit Rr.

Tracy, if you could pull that up.

(Pre-marked Defendant's Exhibit Rr
introduced.)

Q. (By Mr. Eaton) Mr. Sgro, have you reviewed this particular email?

A. I have.

Q. And what does this email tell you?

A. So would you mind blowing up part of it? I apologize. My eyes aren't what they used to be.

Q. Is the middle part what you're looking at?

A. Yeah, I'm looking at the part saying "Chris." Yeah, perfect. Thank you so much. Yeah. So this is from Sean Renshaw to Chris Fitzgerald and Mr. Naviloff, as well as others.

He's saying, "We will need to coordinate getting copies of the DMs, as well as the Gmail he has preserved and any logs. I believe Ryan might be able to assist with that."

This is in reference to either virtual machines or voicemails, whichever one "DM" stands for, which would be -- both contain data that would be part of my analysis. As well as Gmail -- he had preserved -- Gmail is where

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1 Mr. Alrai's emails would have been stored and
2 preserved.

3 Q. And would it have been important for you to
4 have this information prior to trial?

5 A. Yeah. So, many times, I asked -- I advised
6 Counsel to request the communications -- email
7 communications and environments in question,
8 especially the emails from Mr. Alrai. And what
9 we received was a smattering of kind of
10 cherry-picked emails.

11 What we do learn from this, as well as we
12 learned during trial from Mr. Meyer, that he
13 did preserve the totality of Mr. Alrai's
14 emails, and those weren't provided to us. Why
15 that's important is because we're talking about
16 millions of dollars in IT services.

17 When we're evaluating whether or not
18 services were provided, or maybe they were
19 duplicative, or there was billing that was in
20 excess of their value, one of the ways that we
21 do that is to look at the environments
22 themselves. And I fully realize that that's
23 not always possible.

24 So when that's not always possible, the
25 other thing we rely on heavily is

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1 communications, especially by executive leaders
2 in the company. So being able to review those
3 emails and provide my own review of those
4 emails would have been highly beneficial in
5 informing my own opinion of kind of the facts
6 of the case here.

7 Q. And just to be clear, were these produced --
8 these emails that you're talking about -- were
9 these produced prior to trial?

10 A. No, they were not.

11 Q. Were the help desk communications?

12 A. Yes. And so the help desk communications are
13 another place where I asked for -- help desk in
14 a company is very often the kind of
15 communication traffic cop of the organization.
16 All of the problems and resolutions come in and
17 out of there. And so that's another place,
18 when you're talking about technical services,
19 that you can look and learn a lot about the
20 actual services -- what they look like,
21 problems with them, engineering work that is
22 being delivered in support of them. And that
23 was not being provided at all, although it was
24 requested, by Counsel.

25 Q. You indicated that Mr. Alrai's emails -- that

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1 Mr. Meyer had indicated Mr. Alrai's emails were
2 preserved.

3 Did you have any indication that the help
4 desk communications were preserved prior to
5 trial?

6 A. Yeah. Well, so at trial we learned that the
7 help desk -- I believe, if my recollection is
8 correct, we learned that the help desk was
9 preserved as well.

10 Q. Mr. Meyer also testified that with regard to
11 the emails and help desk communications, quote,
12 "We provided RSM access. They took the image
13 with their own imaging tools." He also said
14 that they were forensically looked at by RSM.

15 So what does that tell you about the
16 access that RSM had to these documents that you
17 had requested prior to trial?

18 A. This is similar to the issue with duplicative
19 billing and the cloud environments. It appears
20 that engineers, or people who are associates,
21 or whomever at RSM had access to these
22 environments, whether forensic copies of these
23 environments, or access to the environments in
24 order to perform scanning -- those sorts of
25 things.

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1 So it seems to me that RSM had access to
2 view this and make assessments that we did not
3 have.

4 Q. Now, do you recall your cross-examination at
5 trial?

6 A. Yes.

7 Q. Maybe not every word of it, but --

8 A. Yes.

9 Q. Do you recall that one of the first questions
10 you got on cross-examination was whether
11 Mr. Meyer was in a better position to evaluate
12 the system that he inherited from DigitalNet
13 and Mr. Alrai than you were?

14 A. I do remember that question, yes.

15 Q. And do you recall that your response was
16 basically "yes, because I didn't get to see the
17 service"?

18 A. Yeah, so -- and I'll clarify that, if that's
19 helpful.

20 What we have here is Mr. Meyer has access
21 to these environments, and has, in many cases,
22 provided access to these environments to RSM.
23 But he doesn't have the expertise in order to
24 evaluate these environments; right? I, on the
25 other hand, am the only IT expert or technical

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1 expert that I'm aware of on the case. I have
2 the expertise to evaluate the environments;
3 however, I didn't have the access to.

4 So we were in a little bit of a stalemate
5 there as to who was in a better position. The
6 answer is, certainly, Mr. Meyer had the access
7 to the environment that I did not to view what
8 it was. But he simply does not also have the
9 expertise in which to analyze that environment.

10 MR. EATON: Let's go to Exhibit Tt.

11 (Pre-marked Defendant's Exhibit Tt
12 introduced.

13 MR. EATON: And can you zoom in on that
14 middle email exchange? Yeah. Okay.

15 Q. (By Mr. Eaton) So this is another posttrial
16 discovery email.

17 Have you reviewed this?

18 A. I have.

19 Q. And what does this email tell you?

20 A. This is essentially the senior associate,
21 Mr. Gilpin, at RSM, conversing with a person by
22 the name of Mike Sack in Boston who works for
23 Microsoft on the licensing model and the amount
24 of license servers and products at the
25 United Way. So, essentially, they are

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1 performing an analysis of whether or not
2 Microsoft products were paid for.

3 Q. Okay.

4 Do you recall whether Mr. Meyer testified
5 at trial as to whether Mr. Alrai had allowed
6 the Microsoft products at United Way to go
7 unlicensed?

8 A. I do. I believe -- and this is by
9 recollection, so forgive me on accuracy.

10 I believe he said something to the effect
11 of there were many things that were on trial
12 versions or were unlicensed in the environment.

13 Q. And does this email indicate anything about the
14 accuracy of that claim?

15 A. Yeah, so this is a person, presumably, that
16 works for Microsoft actually saying that
17 there's no issue with the ownership; that there
18 are licenses that have been paid for. And it
19 also means that Mr. Gilpin and -- or by way of
20 or in conjunction with Mike Sack are analyzing
21 this environment, and, I believe, produced a
22 report to this effect.

23 Q. I'd like to go back to the IT environment
24 issue. You had spoken about how you requested
25 it before trial.

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1 In your review of the Government's
2 objection, do you recall the Government arguing
3 anything about the IT environment -- the term
4 "IT environment" being unclear?

5 A. Yeah. I recall reading something to the effect
6 of that they didn't understand what the IT
7 environment was in the context we were asking
8 about it.

9 Q. And what is your response to that?

10 A. So, I mean, the term "IT environment" is fairly
11 well known throughout the industry. I mean, an
12 IT environment being the technical environment
13 that's been analyzed -- or being spoken about,
14 sorry -- not necessarily analyzed -- by
15 Mr. Naviloff.

16 The cloud environments, the VPN
17 environments, the data backup -- those are all
18 examples of IT environments. And I'm not sure
19 what the confusion is there. That seems to be
20 something that's talked about fairly often. So
21 in their objection, I'm not clear as to what is
22 unclear about that.

23 Q. Mr. Meyer at trial described the IT environment
24 as a "road map of what your network looks like.
25 It will give you a map of what's connected to

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1 what within your systems." Does that -- let me
2 ask.

3 Is that a generally accurate idea of what
4 an IT environment is?

5 A. Yeah. I would say that those documents would
6 describe an IT environment accurately. That's
7 obviously not a comprehensive list, but I would
8 agree with that, generally.

9 Q. And do you also recall in reviewing the
10 Government's objection an argument about how
11 preserving the IT environment would be overly
12 burdensome or disruptive?

13 A. I do.

14 Q. Let me ask you.

15 Would preservation of an IT environment --
16 would that disrupt the operations of United Way
17 or prevent a company such as Mr. Meyer's from
18 enacting any necessary remedial measures?

19 A. Yes. To the -- the short answer is no, I don't
20 believe that that would be burdensome. The
21 reason for that is I think in clear cases, the
22 IT environments were preserved at least long
23 enough for RSM to perform an evaluation of
24 certain environments. So in that case, it
25 wasn't burdensome.

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1 In general terms, IT systems are usually
2 backed up, and maybe nightly or whatever. And
3 those backups could be easily used to
4 reconstitute an environment to a point in time
5 where it would not be at all burdensome to the
6 ongoing environment, or production, or the
7 business of the United Way.

8 So I think it's fairly common practice to
9 preserve your environments on an ongoing basis,
10 and safeguard it against things like accidental
11 damage, deletion, viruses, all of that. We
12 could have easily taken a look at that kind of
13 stuff in order to make an assessment of the
14 environment.

15 THE COURT: Can I interrupt here?

16 MR. EATON: Sure.

17 THE COURT: Mr. Eaton or Ms. Brown can
18 answer this question, because I don't know how
19 much time I want to spend listening to the IT
20 environment line.

21 Look, I know there was an IT environment
22 sort of litigation freeze requested by McLane
23 law firm early in the situation, and it doesn't
24 appear to have been honored. Maybe
25 Mr. Commissio or the prosecution disputes that,

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1 but the allegation is it wasn't honored.

2 But for me to attribute that to the
3 prosecution in this case, I have to basically
4 buy into the attribution theory, right, that
5 Mr. Commissio was part of the prosecution team
6 and that he somehow failed to make this happen.

7 Otherwise, I can't really tag that to the
8 prosecution; right?

9 MS. BROWN: Can I just insert, Your Honor?

10 I think one of the things -- going back to
11 our motion, one of the factual things you put
12 in there is that Attorney Commissio, and at
13 least Attorney Davis, were talking in this case
14 and collaborating in this case weeks before
15 Mr. Alrai was even arrested. And in that
16 time -- I think it was shortly after he was
17 arrested that the preservation letter went out.

18 And part of that is that Attorney Commissio
19 was on notice as to preservation during a
20 period of time when he was consulting with the
21 Government about production of documents. I
22 think he even got the grand jury subpoena
23 June 4. So it's all in the same period of time
24 that Attorney Commissio is handing over
25 documents to the Government -- and, we believe,

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1 without asserting privilege, or at least moving
2 to quash, or anything along those lines -- at
3 the same time that he knows that the Defendant
4 is asking to preserve.

5 So I think it's more than that, because of
6 the closeness of -- and we've heard more of
7 that from Mr. Naviloff today --

8 THE COURT: Okay. So --

9 MS. BROWN: -- but most of the facts
10 you're looking for are in our motion.

11 THE COURT: I know. I know they're in the
12 motion. But I'm not looking for the facts.
13 I'm looking for the argument.

14 MS. BROWN: Yeah, that's the argument.

15 THE COURT: But I think you've answered
16 me. Because your point is, I don't necessarily
17 have to buy into the attribution theory,
18 because of the temporal closeness and the
19 actual connections between Mr. Commisso and the
20 prosecutors during this time.

21 MS. BROWN: Correct.

22 THE COURT: Okay.

23 Go ahead, Mr. Eaton.

24 Q. (By Mr. Eaton) Thank you. I really just have
25 one more question on -- well, just one more

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1 question.

2 Which was, do any of the new discovery
3 emails that you've reviewed -- does that
4 indicate that there were, in fact, aspects of
5 the environment that were preserved, but not
6 handed over to you?

7 A. Yeah. So it appears that any of the
8 environments that were -- that Mr. Gilpin or
9 somebody else was doing scanning from RSM on --
10 those environments have to exist in order to
11 perform scanning. That is logical. I have not
12 been able to see those environments. Nor, in
13 all cases, did I see the scans. We saw two
14 scans or so before trial, or as part of
15 pretrial discovery. We have found others
16 afterwards. There was more scanning done which
17 we didn't have. So that certainly impacts my
18 ability to analyze that environment and inform
19 my opinion.

20 Also, a lot of these emails shows those
21 underpinnings, as we've discussed kind of at
22 length today, where these emails and these
23 conversations that are being had are talking
24 about analyses that are being done that we're
25 not privy to. And so I can't comment on them.

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1 I can't look at the validity of them. And I
2 can't inform Counsel as to how to examine those
3 witnesses properly.

4 MR. EATON: Thank you.

5 I don't have any further questions.

6 THE COURT: Who is conducting the
7 cross-examination?

8 MS. LE: I am, Your Honor.

9 THE COURT: Please proceed.

10 MS. LE: Thank you, Your Honor.

11

CROSS-EXAMINATION

13 BY MS. LE:

14 Q. Good afternoon, Mr. Sgro.

15 A. Good afternoon, Counselor.

16 Q. You've been working with the Defendant and his
17 attorney since before trial; is that right?

18 A. That's correct.

19 Q. When were you retained to begin with?

20 A. I believe sometime in August of '19. You can
21 fact-check me, but that is the rough area.

22 Q. And, sir, am I right that you were retained to
23 provide technical analysis and expert opinions?

24 A. That is correct.

25 Q. And as part of your services to the Defendant

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1 in preparation for his trial, did you have
2 access to DigitalNet's business records?

3 A. Their business records -- how do you mean,
4 "business records"?

5 Q. So most businesses maintain records, right, of
6 the services they provide, the bills that they
7 pay, the bills they send out to their clients;
8 is that correct?

9 A. Yeah. So I was made aware of invoices and
10 contracts of that nature, yeah, absolutely.

11 Q. So what business records related to DigitalNet
12 did you review?

13 A. So I got to see IT contracts -- or contracts
14 for IT and technical services. I got to see
15 invoices for those services. And I don't
16 recall much else.

17 Q. Okay.

18 So were those records that you just
19 testified about records that were obtained
20 through discovery from the United States
21 Attorney's Office?

22 A. They were given to me by defense counsel.

23 Q. So are you able, after your extensive review
24 and preparation for these hearings and your
25 guidance to counsel, able to determine what

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1 records you reviewed came from DigitalNet and
2 your client versus records that were produced
3 through the criminal discovery process from the
4 Government?

5 A. I do not believe I am able to deduce the origin
6 of the finding of those documents. Those
7 documents all came to me from defense counsel.

8 Q. So in the course of your analysis -- I think
9 you've used that term sometimes -- did you ever
10 ask for additional records that perhaps
11 DigitalNet would have to kind of supplement
12 what was produced from United Way and other
13 sources?

14 A. I've never made any requests to DigitalNet.

15 Q. Why not?

16 A. I was brought on to offer technical analysis of
17 the environments, and made requests through --
18 or advised counsel about the types of
19 information about those environments that would
20 be helpful to my analysis.

21 Q. And based on your understanding of the evidence
22 that was presented at trial -- and here I have
23 to correct myself, Judge. I think the trial
24 was nine days and not seven -- but you know
25 that DigitalNet was essentially Imran Alrai,

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1 right, and it was his business; do you
2 understand that?

3 A. That's beyond the scope of my practice as a
4 technical expert, but that is what I've -- I
5 mean, that is -- if that is what you are
6 saying.

7 Q. Well, you've reviewed trial transcripts; right?

8 A. I have, yes.

9 Q. And the trial evidence has established that
10 Imran Alrai was DigitalNet; is that right?

11 A. If the transcripts say that, yes.

12 Q. And you'll accept from me that the other
13 company that was involved was the
14 AISA Consulting, which is another business
15 entity run and controlled by Imran Alrai; will
16 you accept that?

17 A. Yes.

18 Q. So did you conduct an independent analysis of
19 DigitalNet's expenditures for IT services to
20 United Way of Massachusetts Bay?

21 A. Of IT expenditures on behalf of those
22 companies?

23 Q. Yes, that DigitalNet provided to United Way.

24 A. No.

25 Q. Why not?

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1 A. That's beyond -- so the -- a financial analysis
2 of that type is generally beyond my scope of
3 practice.

4 Q. Are you aware -- I understand that you
5 confirmed with Mr. Kennedy, who was the
6 Defendant's accounting expert; right?

7 A. That is correct. I helped inform him of
8 certain technical findings.

9 Q. And he -- actually, you reference his
10 conversation with you; is that right?

11 A. That's correct.

12 Q. And so let's start out with that.

13 What kind of technical advice did you give
14 to Mr. Kennedy for his testimony about the loss
15 calculations in this case?

16 A. So, many of the questions that were asked to me
17 by Mr. Kennedy were of the nature -- explaining
18 what certain technical services were. He's not
19 a technical expert.

20 Q. And can you be more specific?

21 A. I don't recall very specifically, but they were
22 generally an explanation of services -- service
23 types, what types of technology services do --
24 that sort of discussion.

25 Q. Do you know whether your communications with

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1 him that informed his opinion were documented
2 in any way?

3 A. I do not know.

4 Q. And were these verbal communications, or were
5 they written communications?

6 A. Generally, my communications are written.
7 Certainly, there were phone calls between
8 myself, Mr. Kennedy, and Attorney Harrington.

9 Q. And you were also present for Mr. Kennedy's
10 testimony at trial; is that right?

11 A. That is correct.

12 Q. And you testified right after Mr. Kennedy; is
13 that correct?

14 A. I believe that's true.

15 Q. And I understand that Mr. Kennedy testified
16 that Mr. Naviloff's loss calculations were
17 overstated; is that a fair assessment of his
18 general opinion?

19 A. I believe that is Mr. Kennedy's opinion, yes.

20 Q. But he, himself, offered no separate loss
21 calculation; is that correct?

22 A. I believe that is correct.

23 Q. Is it correct that Mr. Kennedy relied upon
24 Mr. Alrai's tax return as true statements of
25 his supposed expenses and income; is that

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1 right?

2 A. I suppose so. I'm a little hazy on exactly
3 what he would have put inside of his financial
4 analysis. Again, that's well beyond the scope
5 of my practice.

6 Q. Did you review his financial analysis?

7 A. I read it, yes.

8 Q. Okay.

9 And did you have any opinions about his
10 analysis?

11 A. I -- no.

12 Q. And I believe that in his report, he's offering
13 some guidance that you gave him about why
14 Mr. Naviloff's review could be incomplete; is
15 that right?

16 A. Yeah, that sounds right.

17 Q. Did you, at any time, suggest to Mr. Kennedy
18 that he could review DigitalNet's business
19 records to make a determination about what
20 services were actually provided by DigitalNet
21 to United Way?

22 A. I don't believe I advised Mr. Kennedy on the
23 methods of forensic accounting, no. That's
24 beyond the scope of my practice.

25 Q. And here I'm going to make reference to

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1 Mr. Kennedy's trial testimony, which is that
2 ECF number 109, starting at page 123 to 124.
3 And if you recall this testimony -- I'll read
4 it to you -- regarding Mr. Kennedy's view of
5 invoices -- of DigitalNet's invoices to United
6 Way.

7 And he said, and I quote, "I did some
8 level of review, although to Mr. Naviloff's
9 credit, he seemed to have been very thorough
10 relative to his review of the invoices and the
11 disbursement. And after some rapid cursory
12 review, I determined that there really wasn't a
13 need to replicate that information and I relied
14 on the amounts actually paid."

15 Does that comport with your recollection
16 of the testimony about why he did not conduct a
17 separate analysis of invoices?

18 A. Yes. If that's what the transcript says, yes,
19 absolutely.

20 Q. Will you agree with me that United Way -- I'm
21 sorry.

22 Would you agree with me that your client,
23 Imran Alrai, would be in the best position to
24 know what his business's expenses were and
25 direct costs were for IT services provided to

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1 **United Way?**

2 A. Yeah, perhaps.

3 Q. And if he was conducting a legitimate business
4 and provided legitimate services, his company
5 would be expected to have business records for
6 those services; am I right?

7 A. Again, under normal circumstances, I think
8 businesses have records generally; but, again,
9 you're well outside of the scope of my
10 technical practice there.

11 Q. And were you provided with any records or
12 corroborating information from your client
13 regarding the actual services he provided to
14 the United Way?

15 A. Can you ask that again?

16 Q. Sure.

17 Were you provided with any records or
18 corroborating information by your client to
19 establish what services he actually provided to
20 United Way through his company, DigitalNet?

21 Is that more clear?

22 A. Yeah.

23 No, I don't believe so. Not directly from
24 Mr. Alrai.

25 Q. So you never saw any records about

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1 subcontractor costs; is that right?

2 A. Subcontractor -- what? I apologize.

3 Q. Any subcontractors costs that he might have

4 incurred in providing services to United Way?

5 A. I don't believe so, but, again, this is kind of

6 within the financial analysis, which is outside

7 of what my report covers.

8 Q. Do you remember your initial report -- expert

9 report that you provided right before trial?

10 Do you remember that report?

11 A. I do.

12 Q. And I think it's actually attached as Exhibit G

13 to Defendant's surreply or response.

14 Do you remember that?

15 A. Yes.

16 Q. Now, do you remember making some assessments

17 about services that were provided by DigitalNet

18 to United Way through Pakistan-based employees?

19 A. So there is -- yeah, part of the discussion of

20 DigitalNet is that they have employees in

21 Pakistan.

22 Q. Right.

23 And I think if you -- do you have your

24 report in front of you, sir?

25 A. I do not, but I'd be happy to review it with

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1 you.

2 Q. And do you want me just to read it to you, or
3 do you want to pull it up on your computer
4 screen?

5 A. I'm happy to do either.

6 Q. Okay. Look at page six of your report,
7 paragraph 26; okay.

8 "In addition to being certified by major
9 vendors and professional organizations Cisco,
10 Microsoft, and Project Management Institute,
11 PMI, the DM" -- and I assume that's
12 "DigitalNet" -- "in Pakistan have significant
13 capabilities in the areas of infrastructure,
14 networking, software development, and desktop
15 support consistent with the skills required to
16 fulfill the requirements of the contract
17 awarded to DN by UWMB through the RFP process."

18 Do you remember that statement that you
19 made?

20 A. You are reading, yes.

23 Were you able to attend to your childcare
24 issue?

25 MS. LE: Yes, Your Honor. She just came

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1 in and took care of herself.

2 THE COURT: Mr. Sgro, you don't have your
3 report with you?

4 THE WITNESS: I don't have it in front of
5 me right now. I can pull a copy up of it, or
6 we can look at it together.

7 THE COURT: Well, yeah.

8 Only because your audio is a little bit
9 tough, AUSA Le.

10 MS. LE: Oh, I'm sorry.

11 THE COURT: It's a little bit -- and I'm
12 sure the reporter is struggling, and maybe the
13 witness too.

14 When you say you can pull it up, does that
15 mean that you can get it off a printer, or that
16 you have it right handy, Mr. Sgro?

17 THE WITNESS: I could get it out of our
18 files. I can log into our server and get it.

19 THE COURT: Let's just put it up on the
20 screen.

21 MS. BROWN: Isn't it in our exhibits,
22 Mike?

23 MS. LE: Yes. It's Exhibit G.

24 THE WITNESS: Perfect.

25 MS. LE: But I'm not sure that -- was that

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1 part of the exhibits that you sent, Donna?

2 MS. BROWN: His most recent exhibit was
3 what was included in what we gave yesterday. I
4 don't know -- I think we had his original
5 exhibit too, didn't we? Or -- I can't
6 remember.

7 MR. EATON: No. For this hearing, we only
8 have his supplemental report. His original
9 report is not already an exhibit.

10 MS. BROWN: I do think it's a document,
11 though, wasn't it, in our reply motion, maybe?

12 MR. EATON: Yeah, yeah. It's been --

13 MS. BROWN: Might have been, like, F, or
14 G, or something like that, in our reply motion.

15 MS. LE: I mean, I could tell the Court
16 I'm reading it.

17 MS. UHRIN: This is Tracy. If somebody
18 wants to just email me the document, I can put
19 it up on the screen.

20 THE COURT: Well, is that going to happen?

21 Neha, do we have it?

22 MS. DEWAN: Yeah. I'm emailing it to
23 Tracy right now. Just sent it. It should be
24 in your email box now.

25 Q. (By Ms. Le) And, Tracy, if you can go to page

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1 six, paragraph 26.

2 Mr. Sgro, can you see that?

3 A. Yes, I can.

4 Q. I'll let you read it.

5 A. Thank you. Sorry about that.

6 Q. Where did you get this information that's in
7 paragraph 26?

8 A. So there's a bunch of places that this
9 information was pulled from. The first was --
10 there is -- and I'm trying to recall. There
11 was interviews or testimony with people that
12 worked for DigitalNet, but were U.S.-resident.
13 There was information that was provided about
14 the marketing and capabilities of DigitalNet
15 that was provided to me by Counsel, as well as
16 an overview of some of the skills and
17 capabilities that were there.

18 Q. But what specific records or independent
19 confirmation did you have to make this
20 particular statement in your expert report?

21 A. So I didn't do an independent analysis to
22 actually call these vendors or anything like
23 that, to find out if they were -- if these
24 certifications or these professional
25 organization assessments are true. We relied

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1 on the documents that were provided by Counsel.

2 Q. And you know Mr. Naviloff's report -- fairly
3 detailed; right?

4 A. Quite extensive, yes.

5 Q. And when he made a certain assessment, he
6 actually cited, by Bates number, the source of
7 his information; is that correct?

8 A. Yes, I believe in general, that is correct.

9 Q. Is it not common practice for you to do
10 something so that we can go back and pinpoint
11 where you got the source of the information
12 from?

13 A. In general it is, and I think we've done that
14 in other places in the report as well. I'm not
15 sure why that's not the case here.

16 MS. LE: Let's go -- thank you, Tracy.
17 You can close out that particular screen.

18 Can you highlight paragraph 27?

19 Q. (By Ms. Le) Can you read that to yourself,
20 sir?

21 A. You would like me to read it out loud?

22 Q. No, just to yourself.

23 A. Yes, I've read it.

24 Q. So what does this tell us in kind of laymen's
25 terms?

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1 A. Yeah, so in laymen's terms, my understanding of
2 the DigitalNet entity was that it uses or it
3 leverages what I would call an
4 industry-standard offshoring model.

5 And by "industry-standard offshoring
6 model," I simply mean the use of engineers in
7 less expensive regions in order to pass --
8 regions of the world that have potentially
9 lower salaries for those technical positions to
10 pass savings to client companies. That is a
11 very typical model for any company operating
12 offshore, because Massachusetts is a very
13 expensive market for technology --
14 technologists.

15 Q. So specifically as it relates to this case, are
16 you referring to DigitalNet's operations in
17 Pakistan?

18 A. I'm speaking in this case about my
19 understanding of the model that DigitalNet is
20 operating in.

21 Q. And specifically, other than some kind of
22 operations in Pakistan, where else was
23 DigitalNet subcontracting to work for
24 United Way?

25 A. Subcontracting its work for the United Way?

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1 Q. Yeah, because it sounds like they subcontracted
2 services in less expensive parts of the world.
3 The evidence at trial was that DigitalNet had
4 at least some component in Pakistan.

5 So where else was there services that were
6 rendered to the benefit of United Way --

7 A. So my understanding of DigitalNet is that it
8 operated in Pakistan as an entity in Pakistan,
9 as well as having employees embedded or
10 adjacent to the United Way in Massachusetts.

11 Q. Right.

12 A. Yes, that's correct. Correct.

13 Q. And there's also a gentleman named Kal
14 (phonetic) --?

15 A. That is correct.

16 Q. And he sometimes lived abroad; sometimes in
17 Massachusetts; is that right?

18 A. Reportedly, yes.

19 Q. So can we agree, here you're probably talking
20 about Pakistan; right?

21 A. Oh, in terms of that being an area of the world
22 that would fit this description, yes.

23 Q. Are you aware of any other areas of the world
24 that would fit this description in your expert
25 report?

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1 A. I am aware of other areas of the world that
2 would fit this description, but not where I
3 know that DigitalNet operates.

4 Q. Just so we're clear, I only mean with relation
5 to DigitalNet's operations with all of my
6 questions; okay?

7 A. Fair.

8 MS. LE: So let's go to paragraph 29, if
9 we can, please, Tracy.

10 Q. (By Ms. Le) In here you said, "I find no
11 evidence of duplicative billing or excessive
12 billing based on my review of the RSM report,
13 the services provided by DN or its
14 subcontractors"; right?

15 A. Not -- I just apologize. You read that
16 incorrectly.

17 Q. Oh, I did? I'm sorry.

18 A. "I find no evidence of duplicative billing or
19 excessive billing based on my review of the RSM
20 report, services provided by DN or its
21 subcontractors." So that refers to my review
22 of Mr. Naviloff's opinion, the RSM report, and
23 my review of the documents -- the data provided
24 by -- about the services for which DigitalNet
25 invoiced the United Way. That's correct.

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1 Q. But it also has "or its subcontractors"; do you
2 see that word?

3 A. I do see "or its subcontractors."

4 Q. So are you aware of any additional records
5 relating to subcontractors that were employed
6 or used by DigitalNet for services rendered to
7 the United Way?

8 A. I don't believe so.

9 Q. So you don't have any additional invoices?

10 A. I don't believe I'm in receipt of any invoices
11 that are not known to everyone, no.

12 Q. Did you conduct any independent analysis of
13 DigitalNet's spending in Pakistan?

14 A. Don't do an analysis of any spending. That's
15 outside of my scope of practice.

16 Q. Did you or anyone who was under you at your
17 business request any documentation or records
18 related to any expenses incurred by DigitalNet
19 in Pakistan related to United Way?

20 A. So the expense calculation was something that I
21 talked to Mr. Kennedy about and was within his
22 scope.

23 Q. Okay.

24 So it's something that you talked about
25 with Mr. Kennedy?

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1 A. Sure, yeah.

2 Q. And would that have been helpful and important
3 to you of Mr. Kennedy to rebut Mr. Naviloff's
4 testimony regarding loss calculations?

5 A. It -- sure, there's certainly -- so in a normal
6 -- sorry, didn't mean to say "normal."

7 In the case of performing an analysis of
8 the services and any evaluation of the -- maybe
9 those services on behalf of Mr. Kennedy or by
10 Mr. Kennedy, the cost of those services, I'm
11 sure, would be very helpful in assessing that,
12 yes.

13 Q. And you'd agree with me that your client,
14 Imran Alrai, would know what Pakistan-based
15 expenses and direct costs were related to
16 services that DigitalNet provided to
17 United Way?

18 A. Yeah, I would assume that.

19 Q. And you would also expect that his company
20 would have those records; am I right?

21 A. Yeah, under normal circumstances, I think
22 companies do keep records and that would be
23 reasonable.

24 Q. And you were not provided with any of those
25 records or corroborating information for

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1 DigitalNet's expenses, or expenditures, or
2 spending in Pakistan; right?

3 A. I do not have records of that.

4 Q. And are you aware that Imran Alrai had other
5 business interests, including, like, a gaming
6 or computer animation company in Pakistan?

7 A. I was not -- I was made aware of that, I
8 believe, just pretrial, or made perhaps even at
9 trial when some of that was discussed.

10 MS. LE: Tracy, can you also go to page
11 eight of this same exhibit, paragraph 42? And
12 I'm looking at section E -- 42-E.

13 THE WITNESS: Correct.

14 Q. (By Ms. Le) Do you see that, sir?

15 A. I do see that, yes.

16 Q. And feel free to read it out loud, so I don't
17 misread it again.

18 A. Yeah.

19 "That both Mr. Alrai and DN were adding
20 what appears to be a significant positive value
21 to the United Way of Massachusetts Bay through
22 Mr. Alrai's oversight of DN, DigitalNet, and
23 DigitalNet's performance of the contracts
24 awarded to DN."

25 Q. So it's your belief that he provided value; is

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1 that right?

2 A. Yeah. So in the case -- some of these are --
3 we can objectively see value; right? If
4 they're contracted to provide a phone service
5 and a phone service exists, then there's, of
6 course, value there. Much of the website, you
7 can go to the website and see that there is
8 value.

9 And so we also got to see testimony or
10 statements by fellows -- or leadership at the
11 United Way, as well as his performance reviews.
12 And so we can see through those that,
13 generally, his peers felt that he was doing a
14 good job. He received positive reviews.

15 And that's why I say "what appears to be
16 significant positive value." There's certainly
17 IT projects being delivered, and they seem to
18 be happy with them as a result of a review of
19 that type of material.

20 Q. Okay.

21 But you do understand that when DigitalNet
22 was hired to provide IT services for
23 United Way, they didn't know Mr. Alrai's
24 connection to DigitalNet; you know that, right?

25 A. It's my understanding that that is true.

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1 Q. Now, let's talk about Mr. Naviloff's loss
2 calculations.

3 A. Sure.

4 Q. Because basically, here you kind of disagree
5 generally with how he approached loss
6 calculations; is that right?

7 A. I disagree that -- my understanding is that
8 when you talk about potential loss calculation,
9 part of that is a value of services or what
10 services -- where we're talking about those
11 three categories of duplicative billing,
12 services not rendered, or excess markup, I
13 believe that there are elements of his analysis
14 which are not properly technically informed.
15 And so there are mistakes there, yes.

16 MS. LE: So, Tracy, what I'd like to do is
17 pull up Mr. Sgro's most recent report that was
18 attached as Exhibit F.

19 MS. UHRIN: I apologize, Attorney Le.
20 Which exhibit?

21 MS. LE: F as in "fish."

22 THE WITNESS: I actually think it might be
23 Kk for this hearing.

24 MS. LE: Oh, is it Kk? Thank you.

25 KK. If we can start on page 12, that

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1 would be great.

2 (Pre-marked Defendant's Exhibit Kk
3 introduced.)

4 Q. (By Ms. Le) So, Mr. Sgro, let's start off with
5 this before we go into detail.

6 But you understand that Mr. Naviloff's
7 loss calculation -- the first theory, right,
8 totaled \$3.5 million; is that right?

9 A. Something thereabouts, yes.

10 Q. And he limited that analysis to infrastructure
11 hosting, virtual desktops, data management, and
12 high-availability backup storage and monthly
13 recurring phone services; is that right?

14 A. That seems right, yes.

15 Q. And Mr. Naviloff specifically did not include
16 the \$3.245 million that he assumed value for
17 for "digital web development"; is that right?

18 A. Yeah, I believe that that is true.

19 Q. The "hosting fee"; is that right?

20 A. I believe so.

21 Q. "On-site and after-hours remote IT support"; is
22 that right?

23 A. Yeah, that would be the help -- what we would
24 consider help desk.

25 Q. And then the bucket that he called "special

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1 assessments and miscellaneous expenses."

2 A. Yes, I recall that.

3 Q. And there's another bucket that he calls
4 "hardware and software implementation and
5 application, database and OS management"; is
6 that right?

7 A. That is correct.

8 Q. So I'm going to focus my discussion with you
9 only on the stuff you did consider; okay?

10 A. Okay.

11 Q. And I'm going to actually follow the model of
12 your report, the areas that you raise issue
13 with his analysis based on your review of
14 posttrial discovery; okay?

15 A. Okay.

16 Q. So we'll start here on page 12 and 13, which
17 relates to your analysis of the SIP invoices;
18 is that right?

19 A. Yes, 12 is regarding SIP.US and the finding of
20 excessive billing.

21 Q. So in this instance, DigitalNet charged
22 United Way, at least Mr. Naviloff testified,
23 \$562,580 for managed telephony services; is
24 that right?

25 A. That's correct.

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1 Q. DigitalNet was billed \$24,642 by SIP for
2 telephony services; was that right?

3 A. Yes, that's correct.

4 Q. And your position is that Mr. Naviloff, quote,
5 "incorrectly assessed this as an example of
6 excessive billing on the part of DigitalNet";
7 is that right?

8 A. Yes, that's correct.

9 Q. And this is where you brought in your
10 hypothetical about the car and the tires;
11 right?

12 A. Right.

13 So just to be clear, the \$24,000 that was
14 billed to DTS for telephony services -- so SIP
15 is a small piece of delivering a phone system.
16 It is not the totality of the componentry that
17 would be required to have voicemail, make a
18 dial tone, that sort of thing. So that's why I
19 believe that it's not an apples-to-apples
20 comparison that \$24,000 is not marked up to
21 \$562,000, roughly.

22 Q. Right.

23 But you do know that -- and Mr. Naviloff
24 specifically cited this in his report -- that
25 his evaluation did not include the initial

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1 setup and equipment purchase, which DigitalNet
2 billed separately at over \$200,000; isn't that
3 right?

4 A. I agree, yes. That's correct.

5 Q. And he also didn't include "application OS from
6 database management," which was billed
7 separately at \$3,500 a month; is that right?

8 A. Yeah. So "application OS and database
9 management" don't have anything to do with the
10 context of which I'm speaking here.

11 Q. But isn't this a voice over IP phone service?

12 A. It is indeed.

13 Q. So tell me, what additional services did
14 DigitalNet provide on top of those things that
15 we just talked about that -- those additional
16 services that support the \$540,000 gulf between
17 what they paid for SIP for the phone service
18 and what additional value they've provided to
19 United Way?

20 A. All right.

21 So I think the first thing that we brought
22 up -- and I spoke to this before -- was the
23 timeline -- the contract of dates to which the
24 managed -- what you're calling the application
25 management bucket piece contract was signed.

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1 It actually predates the SIP service by a
2 considerable margin. So we know that that does
3 -- if memory serves, we know that that is an
4 issue with how that relates to the service
5 directly.

6 With regard to what else is required
7 beyond the SIP services, right, you have most
8 of the features of the phone. I agree that the
9 initial setup might have been covered.
10 Typically, the initial setup is paid for by a
11 company as a project, which I think
12 Mr. Naviloff identifies and moves out of the
13 scope of this discussion. I would agree with
14 you.

15 But there is ongoing network and network
16 licensing. There's ongoing data, data charges.
17 There's all the individual features of the
18 phone systems themselves; right? So things
19 like voicemail, or cellphone twinning, which
20 is, like, when it goes to your cellphone.
21 There's all of these features and whatnot.

22 There's also engineering specific to all
23 you can -- creating and setting up new phones,
24 doing that deployment. A phone system is not
25 just a one-and-done; right? You don't just set

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1 it up and kind of forget about it. There's
2 setting up the -- what do you call? You're --
3 all of the operator -- automated attendance.
4 There's a lot of moving pieces here that
5 require engineering expertise, that is not
6 necessarily a help desk item, that go into
7 providing these services.

8 And I think when you compare this to the
9 services that Mr. Meyer talks about
10 providing -- because Mr. Meyer replaced his
11 phone system with one -- kind of a -- that they
12 chose, to move away from -- move towards. The
13 cost of that new phone system is actually not
14 that different than the cost of the phone
15 system as it was being managed by DTS; right?
16 So there's a very similar cost model there.

17 Q. You listed a bunch of features.

18 Do you know for a fact which of those
19 features were provided by DigitalNet to
20 United Way in regards to the managed telephony
21 services?

22 A. So I don't know that. And that's part of the
23 issue of why assessing a number and a value of
24 this service is so difficult.

25 And I want to point out it's not -- I'm

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1 not trying to take a purist road on this and
2 saying "you have to look at everything and have
3 every scrap of data or you can't figure
4 anything out."

5 A lot of these services -- a lot of those
6 types of services are not detailed in the
7 invoices, right, and in the actual invoice and
8 contracts. And so it would have been great to
9 be able to see this actual system in order to
10 help us understand what the real value of the
11 system was.

12 Because there was a system -- presumably,
13 there is a phone system -- during Mr. Alrai's
14 time and tenure at the United Way, there was a
15 phone system, and it was functioning; right?
16 So that does have a value. And that value is
17 considerably higher than \$24,000, which is the
18 cost of the SIP services; right? And so that's
19 not a direct correlation of markup.

20 Q. Sir, I think you might not be answering my
21 question.

22 A. I apologize.

23 Q. But let me just be clear.

24 You don't know what additional features
25 were offered by DigitalNet to United Way; is

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1 that right?

2 A. I do not know the totality of the features.

3 That is correct.

4 Q. And your client, Mr. Imran Alrai, at the

5 relevant time was a CIO for United Way; right?

6 A. I believe he was the director of IT or vice

7 president of IT-something during time, yes.

8 Q. From September 2014 through September 2017, he

9 was in one of those IT high-level roles at

10 United Way; right?

11 A. That is correct.

12 Q. And for those relevant times, he was also the

13 principal of DigitalNet, which was providing

14 the managed telephony services; is that right?

15 A. Yes.

16 Q. So would you agree with me that your client,

17 Imran Alrai, would know what those extra

18 services were that were provided by DigitalNet

19 to United Way for managed telephony services?

20 A. I would agree that it's possible that he knows,

21 yes.

22 Q. And his company would have records of what

23 those additional features were that were

24 provided to United Way; right?

25 A. I can't speak to the records that his company

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1 created or had; but, I mean, there's that
2 chance, yes.

3 Q. Like you mentioned earlier, there's a lot of
4 different ways to get the same information;
5 right?

6 A. Sure. There are definitely similar ways to get
7 similar information, yes.

8 Q. One of the ways you suggested was having access
9 to this, quote, "IT environment"; right?

10 A. With regard to the telephony system, yes. Or a
11 backup of it -- any copy or ability to see this
12 environment, that's correct.

13 Q. And if one were the vendor providing said
14 services, one would expect the vendor to have
15 the records to support what services they've
16 provided; that's fair, right?

17 A. I would think that that was possible, yes.

18 Q. Would you agree with me --

19 THE COURT: Well, let me ask a question
20 now.

21 I understand your line of questioning, and
22 it would make sense to me in a case of normal
23 discovery, like a discovery violation of a rule
24 or a court order.

25 But would you agree with me that even if

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1 the Defendant has the records you're talking
2 about, if they're exculpatory records and they
3 are in the possession of or under the control
4 of the Government, the Government still has an
5 obligation to produce them?

6 MS. LE: Right. But that is not my
7 argument, Your Honor. The point is that there
8 can be no prejudice here if there was a
9 different way for Mr. Sgro to conduct his
10 analysis, as he has recognized, separate and
11 apart from records that we did not possess and
12 could not produce.

13 So this goes, again, to our discussion
14 about how can there be prejudice to the
15 Defendant with respect to Mr. Sgro's testimony
16 at trial, and his ability to assist counsel on
17 cross-examination of Mr. Naviloff, Mr. Meyer,
18 and any other quote, "technical witness," that
19 the Government presented, Your Honor?

20 THE COURT: Well, which horse are you
21 riding on? Is it didn't possess and can't
22 produce? Or no prejudice, even if you could
23 produce it and you did possess? I'm trying to
24 keep up.

25 MS. LE: Number one, the records that have

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1 been produced since trial consisting of
2 email -- internal email communications of RSM
3 that were not in our possession -- Your Honor,
4 we cannot produce that, so we don't have an
5 obligation to produce that.

6 THE COURT: You don't think --
7 Mr. Naviloff said he met with the prosecutors
8 and with Commisso and discussed those emails.

9 MS. LE: But --

10 THE COURT: Wait a minute. Hold on.

11 MS. LE: Sure.

12 THE COURT: Now, you might not have had
13 possession of them, but you certainly knew
14 about them. And you don't think a prosecutor
15 has an obligation to review internal expert
16 file information to determine if there's
17 anything exculpatory? That's a problem here
18 that none of this is going to address.

19 And I need to understand from you --
20 you're telling me, then -- and believe me, the
21 obligations of a prosecutor here is not
22 something there's a lot of precedent for. I
23 recognize that. But I think it's incumbent on
24 a prosecutor who knows about records in an
25 expert file to review them, and at least to

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1 make a determination if they are exculpatory.

2 They weren't ordered to be produced, I
3 agree. And they weren't -- there's no court
4 rule that required production, we agreed. But
5 once you know about them and they're in the
6 expert's file, there's at least an argument
7 that there's an obligation to review them for
8 exculpatory information. All right.

9 MS. LE: Your Honor, I think this is --
10 the other difficulty here is that they --
11 "they" being the defense counsel -- have
12 alleged generally that everything that we
13 haven't handed over -- every single one of
14 those emails is exculpatory, for some kind of
15 indirect way that they could be used to either
16 impeach Mr. Naviloff about his colleagues on
17 whom he may have had conversations, or
18 information that Mr. Sgro could or could not
19 have reviewed, Your Honor.

20 THE COURT: Sure, but where you're going
21 to have a problem, AUSA Le, is that I don't
22 share that opinion that every single email is
23 exculpatory. But I do share the opinion that
24 some of them were; all right? And I concur
25 that you may or may not have had possession of

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1 them. I don't really know. But I do know, at
2 least, it was discussed. And some of them were
3 exculpatory. Witness credibility is
4 exculpatory. That's the law. And some of this
5 stuff goes to Mr. Naviloff's credibility.

6 And what I'm asking you is, very
7 specifically -- I think you answered me, by the
8 way, because you talked to me about prejudice.
9 It sounds like you're telling me that -- let's
10 assume for a moment that it was exculpatory. I
11 know you're not agreeing to that. But assuming
12 it is exculpatory, and if it was also available
13 somehow to Mr. Alrai, are you saying that that
14 relieved the prosecution of its obligation to
15 produce it?

16 MS. LE: This goes back to the question of
17 prejudice.

18 THE COURT: So there can't be prejudice if
19 the information was also readily available to
20 Mr. Alrai, is the idea?

21 MS. LE: Right.

22 And this is another example that I will
23 speak with on Mr. Sgro later, because there is
24 an email that they reference about
25 CloudConnect. And in the email, there are

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1 Bates-labeled records that are referenced. And
2 they're discussing amongst themselves what --
3 those Bates-labeled records that came from
4 grand jury subpoenas that were provided by the
5 Government in pretrial discovery to the
6 Defendant. So we give them the underlying
7 record.

8 Mr. Sgro could have come up with whatever
9 conclusions he had, which may or may not be on
10 the same page that RSM had. But the basis is
11 it's the underlying records which are
12 exculpatory, potentially -- and that was
13 produced in discovery pretrial. Mr. Sgro had
14 access to it. We produced that to Defense
15 counsel. Those were records that were not
16 possessed by the United Way, Your Honor.

17 THE COURT: Wait a minute.

18 Not possessed by United Way?

19 MS. LE: Right.

20 We got it through grand jury subpoena from
21 the vendors. The CloudConnect records that
22 were referenced in Defense Exhibit -- let's
23 see -- in M, for example, Your Honor, which
24 Mr. Eaton went through with Mr. Sgro. And
25 they're talking about -- communications between

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1 RSM's employees about records that were
2 produced by grand jury subpoena.

3 THE COURT: Yeah. Okay. I get it.

4 MS. LE: So, I mean, Your Honor, there is
5 more than one source for the information that
6 is allegedly potentially exculpatory. What the
7 problem is, and I think this is the Court's
8 struggle, and you kind of clued us into this,
9 which was -- what is the authority that says
10 that the Government has an obligation to
11 obtain, from its third-party expert witness,
12 delivered or processed email?

13 THE COURT: Yeah.

14 MS. LE: Now, do we, as a general idea,
15 know that people email one another? I'm sure
16 that Mr. Sgro has emailed --

17 THE COURT: Wait a minute.

18 But that's not the evidence now. The
19 evidence is not -- is it a general idea.

20 Mr. Naviloff testified he told you about the
21 emails.

22 MS. LE: With respect, Your Honor, I think
23 Mr. Naviloff said that he recalls some
24 conversation about whether there should be
25 emails that should be disclosed. And the

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1 general understanding was that they would not
2 have to be disclosed, Your Honor.

3 And my belief is that unless there is
4 something that bears to contradict what a
5 witness says, if a witness includes that
6 information -- the communication -- the
7 substance of the communication in their formal
8 reporting, that that is covered. You don't
9 need all the same information repeated multiple
10 times.

11 THE COURT: Again, first of all, just so
12 you know, my understanding of Naviloff's
13 testimony is that he talked to you and
14 Mr. Commisso about these emails. All right.

15 MS. LE: No, Your Honor. I believe he
16 said Mr. Davis or Mr. Hunter. I was not
17 involved any of those communications.

18 THE COURT: I'm sorry. I didn't mean you.
19 I didn't mean you, personally. I meant the
20 office.

21 Now, that's my understanding of the
22 evidence. But, again, it's -- the decision --
23 I even said it at the time to Naviloff. The
24 decision not to produce the emails -- that
25 wasn't unreasonable. It doesn't seem to have

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1 been required by the rules of discovery. I
2 think I agree with you. But once the office
3 knows about the emails that the file contains
4 -- you're putting an expert on the witness
5 stand. I mean, I just think it's at least good
6 practice.

7 And I don't know what the authority is --
8 I know that there's probably no authority
9 requiring the production of those in normal
10 criminal discovery; but I do wonder if there's
11 not a duty, in coming upon a prosecutor, to
12 review that to ensure that there's nothing
13 exculpatory. And my view about some of these
14 emails -- none of this is devastating stuff, I
15 agree with you. But some of it has exculpatory
16 value.

17 As to Mr. Sgro, I kind of interrupted you
18 there, and I apologize. I -- to me, at least
19 from what I've heard so far, the value of any
20 of this has much more to do with examining
21 Naviloff on cross, or perhaps maybe even Meyer,
22 than it does arming Mr. Sgro with
23 more information. I just think that for many
24 of the reasons you're pointing out here on
25 cross, that might not have made too much of a

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1 difference.

2 So for what that's worth -- anyway, I
3 interrupted you, and I'm sorry. You answered
4 my questions, and I'll let you continue.

5 MS. LE: Your Honor, I think that we're
6 going to have the transcripts of Mr. Naviloff's
7 testimony prepared at some point, so I'm just
8 speaking from my recollection and understanding
9 and appreciation of his testimony.

10 But it wasn't clear to me, and I think you
11 had a little bit of an exchange with him, about
12 when this conversation might have occurred
13 between Mr. Naviloff, Mr. Commisso, and some
14 member of the U.S. Attorney's Office -- whether
15 that was pretrial, I'm not clear on, but
16 certainly since trial -- do you see where the
17 confusion comes in about where our obligation
18 would have been?

19 THE COURT: Sure. Yes, I do see what
20 you're saying.

21 I took that testimony -- remember, I kept
22 telling Naviloff, "We're talking about
23 pretrial, not post."

24 Because he kept going into his whole
25 routine about, "Oh, well, it's 600 emails, and

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1 we were so forthcoming." And it's true, but we
2 were focused on pretrial.

3 Now, if I misunderstood that, yeah, I'll
4 need to be disabused of that. But, look, I
5 think that's an easy thing to solve. We're
6 going to hear from Mr. Commisso. And I would
7 never put any of the AUSAs to the indignity of
8 going under oath, but I assume you'll represent
9 to me what happened there. You'll explain it
10 to me -- somebody will -- just during the
11 context of this hearing at some point, so I'm
12 sure I'll get that clarified. But, yeah, to
13 the extent that I misunderstood the timing,
14 that's important. Okay.

15 MS. LE: And, Your Honor, I might have
16 misunderstood that timing too.

17 THE COURT: It could have been either of
18 us.

19 MS. LE: Right. Okay.

20 Q. (By Ms. Le) So let's move on and talk about
21 your discussion of CloudConnect, which is the
22 next section of your reporting; right -- the
23 supplemental report?

24 A. Can we pull that up?

25 MS. LE: I think if you move to

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1 page 15-16, Tracy.

2 Q. (By Ms. Le) Mr. Sgro, can you review page 15
3 and make sure this is the section you were
4 talking about, "CloudConnect"?

5 A. I begin speaking about CloudConnect in section
6 D, I believe.

7 Q. Right.

8 There in document 130 -- that part?

9 A. Yeah, that looks to be true. I apologize. It
10 is very small.

11 Q. Sure.

12 Tracy, can you highlight D through E?

13 A. Yeah.

14 Q. So this is your kind of analysis for why, based
15 on your review of posttrial discovery, you have
16 issues with his analysis; is that right?

17 A. Yeah, this outlines some of the issues that I
18 have with the analysis. That is correct.

19 Q. Part of it is that this isn't really an
20 apples-to-apples comparison; is that right,
21 sir?

22 A. That is correct.

23 MS. LE: I think -- can we go to page 16,
24 Tracy? And we'll go to the first two
25 paragraphs on top.

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1 Q. (By Ms. Le) Can you explain what it is that
2 you agreed with Mr. Naviloff, and what
3 additional services were delivered as far as
4 you know?

5 A. Yeah.

6 So the first sentence is that
7 "CloudConnect is simply a sandbox in which
8 value-added resellers" -- so that would be
9 pretty much anyone like DigitalNet or any other
10 company that actually builds any engineering in
11 the Cloud. We build for the client.
12 CloudConnect is not a service unto itself
13 outside of hosting; right? So they provide a
14 sandbox. A value-added reseller builds within
15 that sandbox.

16 I do agree with Mr. Naviloff on the point
17 -- well, let me just read this for a second.
18 Yeah, so the CloudConnect service; right -- the
19 actual infrastructure that's being provided
20 there is being used here in this example by
21 DigitalNet to perform -- to give them --
22 provide United Way with these services; right?

23 And those services, being what they are, I
24 believe -- and this is maybe out of context --
25 is the virtual hosting -- that would greatly

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1 exceed the cost of just having a CloudConnect
2 service; right? Because that's -- the value
3 of what's provided to the United Way would, of
4 course, logically outstrip the cost of just the
5 sandbox itself.

6 Q. And you reviewed Mr. Naviloff's expert report
7 where he kind of did a comparison using
8 DigitalNet's contract with United Way for these
9 services, and then pulled up CloudConnect's
10 platform specifications and put them together
11 in the chart; do you remember that?

12 A. I do remember something to that effect, yes.

13 Q. And in his mind -- at least in his analysis, he
14 saw that it was near identical language that
15 seemed to be cut and paste from CloudConnect's
16 platform specifications into DigitalNet's
17 contract with United Way; do you remember that?

18 A. Yeah, I do, and I think I can go a step further
19 and try to explain that for you.

20 When a company like CloudConnect sells
21 their services through a value-added reseller,
22 the services that are provided by CloudConnect
23 are inherent to any services provided by the
24 reseller. So, for instance, if CloudConnect
25 provides 99.99 percent uptime, as an example,

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1 then the things that are built within it could
2 likely have that, and so they would translate
3 that language through to the end customer as
4 the value-added reseller.

5 We see this in software quite a bit;
6 right? So, very common for a value-added
7 reseller to take the capabilities of the --
8 kind of the principal -- a CloudConnect-like
9 object and add those direct capabilities. And
10 I would agree that it's not usually
11 copy-and-paste verbatim, but there's nothing
12 wrong with doing that, technically. Because --
13 well, and any of the services that are used
14 that are gained through the CloudConnect
15 service are inherently passed on to the end
16 client when you build within it.

17 Q. So maybe I should ask it this way.

18 Did you, yourself, conduct an independent
19 evaluation of the DigitalNet services as it
20 relates to CloudConnect in that contract? Did
21 you do a similar kind of analysis?

22 A. So I was never permitted to see the
23 DigitalNet/CloudConnect services.

24 Q. No, I mean, did you review the contract
25 language in the contract between DigitalNet and

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1 **United Way?**

2 A. **Yes, I did.**

3 Q. **For this particular service?**

4 A. **Yes, I did.**

5 Q. **So in addition to the CloudConnect translated**
6 **services, what other services did United Way**
7 **give --**

8 A. **You would have to pull that up for me.**

9 MS. LE: I think that Mr. Naviloff's
10 report -- I'm going to have to ask one of my
11 colleagues to email that to -- Mr. Hunter, can
12 you help me with that?

13 THE COURT: You know what? It's 4:48.
14 Let's pick it up next time.

15 All right. I guess, you know what? I'm
16 going to have counsel confer and schedule the
17 next time with Charli. We're going to continue
18 the hearing. We've got to get through the
19 evidence, and I want to hear your arguments,
20 and I have questions that I'll pose to you
21 then. All right. Sorry for the inconvenience
22 to anybody who's going to be coming back, but
23 we'll keep on keeping on here.

24 Anybody have anything they need addressed
25 before we adjourn? Okay. So get in touch --

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1 confirm with each other and get in touch with
2 Charli.

3 Charli, if you could look and maybe send
4 them an email with some days or half days open
5 in the near future. I know it's not easy.

6 THE CLERK: Will do, Judge.

7 THE COURT: Why don't we all commit to the
8 Friday after Thanksgiving? Just kidding.

9 THE CLERK: So I will be in touch.

10 Do you think we need a good half a day?

11 MS. LE: At this rate, I think we're going
12 to need another full day.

13 Don't you think, Donna?

14 MS. BROWN: To be on the safe side, I
15 think, yes. I do not think that Meyer and
16 Mr. Commissio will be as long as these two
17 witnesses, but I think to be on the safe --
18 and, plus, we've got a lot of argument. And,
19 as the Judge said, he had a lot of questions.
20 So to probably be on the safe side, I think
21 that's a good idea.

22 THE CLERK: Okay. I will send you all an
23 email and we'll select something.

24 Thank you.

25 (The hearing was adjourned at 4:59 p.m.)

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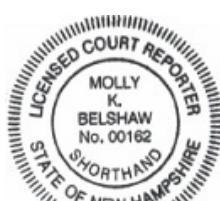
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C E R T I F I C A T E

I, Molly K. Belshaw, a Licensed Shorthand Reporter for the State of New Hampshire, and Registered Professional Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceeding taken at the place and on the date hereinbefore set forth to the best of my skill and ability under the conditions present at the time. Read and sign was not requested.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken, and further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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